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IN THE

Supreme Court of the United States

NGC SETTLEMENT TRUST AND THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

Petitioners,

v.

NATIONAL GYPSUM COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the operating entity that emerges from a chapter 11 reorganization is insulated from liability for non-dischargeable asbestos claims merely because the reorganization left intact a non-operating shell corporation with liability for such claims.

II. Whether the operating entity that emerges from chapter 11 can, consistent with the Due Process Clause, escape liability for non-dischargeable asbestos claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 14.1(b), all parties to the proceeding are listed in the caption of this petition.

Pursuant to this Court's Rule 29.6, petitioners certify that the parent corporation of petitioner the Asbestos Claims Management Corporation is petitioner NGC Settlement Trust, which has no parent corporation. Petitioners further certify that no publicly held company owns 10% or more of either petitioner's voting stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NGC Settlement Trust (the "Trust") and the Asbestos Claims Management Corporation ("ACMC") respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 3a-39a) is reported at 219 F.3d 478. The memorandum opinion and order of the district court (App., *infra*, 40a-59a) is not reported. The bench ruling (*id.* at 62a-81a) and judgment (*id.* at 60a-61a) of the bankruptcy court are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 2000. A petition for rehearing was denied on December 5, 2000. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Pursuant to this Court's Rule 14.1(f), provisions of the Bankruptcy Code pertinent to this case, including 11 U.S.C. §§ 105, 524(g), 727 and 1141, are reproduced in the Appendix, *infra*, at 81a-96a.

STATEMENT

This case involves the liability of a company, created as part of a bankruptcy reorganization, for claims by persons who were exposed to asbestos products manufactured by the debtor and who were unidentifiable at the time of the bankruptcy case. The bankruptcy court below held that the company is liable for such claims to the extent that funds set aside during the reorganization for this purpose proved insufficient. The district court affirmed. The Court of Appeals, by divided vote, reversed, holding that the new company could only be liable to the extent that such claimants could establish successor liability under state law.

1. On October 28, 1990, chapter 11 petitions were filed by National Gypsum Company ("National Gypsum") and its parent, Aancor Holdings, Inc. (collectively with National Gypsum, the "Debtors"). App., *infra*, 41a. National Gypsum faced claims from two different groups of creditors: bondholders and trade creditors (the "Financial Creditors"), who were owed more than $1 billion, and persons exposed to asbestos products manufactured by National Gypsum (the "Asbestos Claimants"), whose claims were estimated to exceed $800 million. *Id.* at 5a. The Asbestos Claimants consisted of two distinct groups of claimants: those known claimants who held identifiable claims against National Gypsum for exposure to asbestos products manufactured by National Gypsum (the "Current Claimants") and those unknown claimants who in the future would be entitled to assert claims for exposure to asbestos products manufactured by National Gypsum but who, as of confirmation, had no cognizable claim under applicable state law (the "Unknown Claimants"). *Ibid.*

On March 9, 1993, the bankruptcy court entered a confirmation order (the "Confirmation Order") approving a plan of reorganization (the "Plan") for the Debtors. App. *infra*, 42a-43a. Under the Plan, three entities emerged from the bankruptcy proceedings: (1) National Gypsum Company ("New-NGC"), which was wholly owned by the Financial Creditors and received the name, substantially all of the operating assets of the Debtors and the ongoing business of National Gypsum; (2) ACMC (sometimes called "Old-NGC"), which retained National Gypsum's asbestos insurance policies and the stock of The Austin Company, a service subsidiary of the Debtor; and (3) the Trust, which received all of the stock of Old-NGC and was established solely to settle asbestos claims. *Id.* at 42a-43a. This structure effected a distribution to the Financial Creditors, by means of a non-arms-length asset purchase agreement, of substantially all of the operating assets of the Debtors, and enabled the Financial Creditors to continue National Gypsum's operating business. At the same time, the structure afforded the Asbestos Creditors, through the Trust, with control over Old-NGC's asbestos insurance policies that, for insurance reasons, had to remain in the possession of Old-NGC. Thus, for all intents and purposes, New-NGC emerged as the operating entity which continued the operations of National Gypsum under the ownership of the Financial Creditors, and Old-NGC emerged as a liquidating, non-operating shell owned by the Trust.

The original version of the Plan voted on by creditors proposed that all asbestos claims, both current and unknown, would be discharged and that all Asbestos Claimants would be enjoined from proceeding against

New-NGC. App., *infra*, 43a. At the time, it was assumed that (1) the so-called *Georgine* settlement, which limited the number and nature of asbestos claims that were compensable and the amount of compensation payable for each claim, would receive judicial approval and, therefore, (2) the Trust would have sufficient assets to pay all current and unknown asbestos claims through Old NGC's participation in the Center for Claims Resolution ("CCR"), a facility established by a consortium of former asbestos manufacturers. *Id.* at 7a.

The legal representative for the Unknown Claimants (the "Legal Representative"), who had been appointed by the bankruptcy court in late 1992 shortly before the commencement of the plan confirmation hearing, objected to the original version of the Plan on the ground that the bankruptcy court lacked authority to prevent Unknown Claimants from pursuing New-NGC in the future. App., *infra*, 8a. The bankruptcy court sustained this objection, concluding that the future asbestos claims held by Unknown Claimants were not "claims" within the meaning of the Bankruptcy Code, and thus that it lacked jurisdiction to discharge them or to permanently enjoin the Unknown Claimants from pursuing their future claims. *Ibid.* The court concluded that it could, however, issue a temporary injunction requiring the Unknown Claimants to look first to the Trust for payment. *Ibid.* The court's rulings on the issue were incorporated into the Plan as technical modifications, which were adopted by the bankruptcy court. *Id.* at 9a.

Accordingly, as confirmed, the Plan discharged the claims of the Current Claimants, and permanently enjoined these claimants from seeking relief against any entity other than the Trust. *Id.* at 9a. The claims of the

Unknown Claimants were not discharged, but the Confirmation Order included a "Channeling Order" that made the Unknown Claimants beneficiaries of the Trust and enjoined them from suing any other person, including New-NGC, pending exhaustion of the Trust's assets. *Id.* at 9a-10a. On the effective date of the Plan, all of the operating assets of the Debtors were transferred to New-NGC, a newly organized entity created to receive those assets as the distribution to Financial Creditors under the Plan. *Id.* at 10a.

2. In May 1996, the Third Circuit set aside the *Georgine* settlement, and this Court subsequently affirmed that decision. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). These judicial decisions led directly to the filing of the present lawsuit by the Trust. As a result of these decisions, the Trust could no longer pay full tort values to all asbestos disease claimants. App., *infra*, 10a. The Trust and ACMC therefore initiated a declaratory judgment action in the bankruptcy court, seeking a determination that, in the event the Trust exhausted its resources and the Channeling Order lifted, New-NGC—which was denying residual liability to the Unknown Claimants—was liable to such Unknown Claimants to the same extent as National Gypsum had been liable to such Claimants. *Ibid.*

a. In ruling upon the request of the Trust and ACMC, the bankruptcy court held that, under the Plan and its implementing documents, New-NGC remained liable to the Unknown Claimants to the same extent as National Gypsum had been liable to such Claimants. App., *infra*, 62a-81a.

The bankruptcy court recognized that "this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New-NGC." App., *infra*, 64a. In making this determination, the court noted that "[t]he plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs." *Id.* at 65a. "Applying these fundamental rules of contractual construction," the bankruptcy court conducted a painstaking review of the plan documents and court orders and thereafter found that the Trust and ACMC were entitled to the declaratory relief they sought:

> [T]he plan as confirmed by order of this court implicitly imposes or maintains liability on New-NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust. *That is the only reading that gives meaning to the court's order* that the non-Bankruptcy Code asbestos disease claims could not be and were not discharged; that the [claimants] could not be permanently enjoined from commencing tort litigation against New-NGC and that the channeling order with a temporary injunction [of] suit[] against New-NGC could be lifted by order of this court upon the satisfaction of the enumerated criteria. If the plan did not impose or maintain liability on New-NGC, then the court's decision that the subject claimants could not be permanently enjoined becomes a meaningless

> court order, as does the court's order that those claims could not be discharged.

Ibid. (emphasis added). Accordingly, the bankruptcy court entered a declaratory judgment: "New-NGC is liable for an unknown asbestos disease claim . . . to the extent that such unknown asbestos disease claim has not been discharged by the Plan and Confirmation Order and is not satisfied or otherwise resolved by the Trust and ACMC." *Id.* at 48a. The bankruptcy court made clear, however, that the judgment "does not relieve any individual unknown asbestos disease claimant of any element of his burden of proof in any individual tort litigation." *Id.* at 61a.

b. The district court affirmed the bankruptcy court. App., *infra*, 40a-59a. At the outset, the district court noted that "the issues raised in this Adversary Proceeding required the Bankruptcy Court to interpret the Confirmation Order," and that "when an appellate court reviews a lower court's interpretation of its own order, that interpretation is afforded great deference." *Id.* at 51a. The court held that the bankruptcy court had correctly construed the various documents.

The district court agreed that the plan documents implicitly recognized that New-NGC would remain liable for unknown asbestos claims:

> [T]he Bankruptcy Court explicitly stated in its Confirmation Order that "New-NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease claims *pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund.*" The clear

> implication of this statement is that once the Settlement Fund is exhausted, Unknown Claimants may commence litigation against [New-NGC].

App., *infra*, 53a-54a (citation omitted) (emphasis added).

Before the district court, New-NGC argued that while the Plan and the Confirmation Order did not permanently enjoin Unknown Claimants from holding New-NGC liable for their claims, Unknown Claimants nevertheless would have to prove "successor liability" under applicable state law to impose liability on New-NGC. The district court rejected this argument because "nothing in the Plan, Plan Documents or Confirmation Order . . . contemplates this reading." App., *infra*, 54a.

c. The Court of Appeals, by a 2-1 vote, reversed. App., *infra*, 3a-39a.

The majority acknowledged that it "should defer to the bankruptcy court's reasonable resolution of any ambiguities in [the plan] documents." App., *infra*, 15a. The majority also found it appropriate to refer to extrinsic evidence because "where there is ambiguity in the documents, and especially where there is a dispute as to what the parties understood them to mean, extrinsic evidence such as this should inform our analysis." *Id.* at 19a. Despite finding the documents ambiguous, however, the majority did *not* defer to the construction afforded them by the bankruptcy court.

Undertaking its own analysis of the plan documents, the majority concluded that at the time of confirmation of the Plan the bankruptcy court must have intended that New-NGC could be liable to the Unknown Claimants

only upon a finding of successor liability under state law. App., *infra*, 28a. Turning both bankruptcy law in general and the bargain between the creditors of National Gypsum upside down, the majority dismissed Petitioners' arguments that New-NGC is the reorganized debtor and, as such, is liable to Unknown Claimants to the same extent as National Gypsum.

Judge Reavley dissented. He observed that "it is incredible to believe that the bankruptcy court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation, without leaving so much as a footnote in the controlling documents suggesting such an intent." App., *infra*, 39a. Judge Reavley opined that the Court of Appeals "should reject the incredible and stay with the judgment of the bankruptcy court." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Court of Appeals has interpreted the Plan in a manner that violates both the Bankruptcy Code and the Due Process Clause of the Fifth Amendment to the Constitution. In so doing, it has created dangerous precedent on issues of fundamental national importance. For these reasons this Court should grant this Petition and take jurisdiction of this case.

In its opinion below, the Fifth Circuit analyzed the issues presented in this case as strictly matters of plan interpretation. "Our duty is to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown

Claims. " App., *infra,* 16a. Adopting this approach, the court ignored its equally important duty to interpret the Plan in a manner consistent with the Bankruptcy Code and the Constitution. Nowhere in its opinion does the court analyze whether any of the competing interpretations of the Plan, much less the interpretation adopted by the court, were consistent with applicable law. As a result, the court approved an interpretation of the Plan that violates both the Bankruptcy Code and the Due Process Clause. Specifically, and as discussed more fully below, the court's holding violates the discharge provisions of the Bankruptcy Code, as set forth in Section 1141, and severely prejudices the rights of Unknown Claimants in violation of the Due Process Clause.

The impact of the court's errors is significant and widespread. More than 400,000 Unknown Claimants in this case alone will be effectively precluded from recovering for their injuries. The impact, however, is not limited to this case. The court's opinion creates a dangerously bad precedent that affects future asbestos claimants and other mass tort victims in other cases. Because of the broad effect of the Fifth Circuit's erroneous opinion, the Court should grant this Petition and assert jurisdiction over this case.

I. The Fifth Circuit's Opinion Violates Section 1141 Of The Bankruptcy Code And Effectively Insulates New-NGC From Future Asbestos Claims That Have Not Been Discharged.

The Fifth Circuit approached the issues presented in this case strictly as a matter of plan interpretation. Identifying three alternative interpretations of the Plan, the court based its ruling on its determination that New-NGC was not the reorganized debtor, but instead a "new

corporation" that purchased the operating assets of the Debtors free and clear of claims of creditors of the Debtors, including specifically Unknown Claims. On that basis, the court held that New-NGC could only be liable to Unknown Claimants to the extent that such claimants could establish successor liability under applicable state law.

As the bankruptcy court and the district court both recognized, however, New-NGC, far from being an unrelated third party asset purchaser, was an entity created in connection with the Plan to hold National Gypsum's operating assets and continue National Gypsum's operating business, including the Gold Bond division which had produced the asbestos products manufactured by National Gypsum. The owners of New-NGC were the Financial Creditors who received their ownership interest not through a purchase but through a distribution under the Plan on account of their claims against National Gypsum. In the Confirmation Order, the bankruptcy court not only refused to discharge and enjoin future claims, but it refused to transfer the operating assets to New-NGC free and clear of these future claims. Under these circumstances, New-NGC can not have been afforded any greater protection from future claims than Old-NGC. Yet, the Fifth Circuit would cloak New-NGC with additional protection and, in the process, undermine the bargain evidenced by the Plan and the carefully constructed discharge limitations imposed by the bankruptcy court in the Confirmation Order.

A. The Fifth Circuit's Opinion Ignores The Confirmation Order In Violation Of Section 1141 Of The Bankruptcy Code.

Chapter 11 of the Bankruptcy Code provides for the reorganization of corporate debtors. *See generally* 7 *Collier on Bankruptcy* ¶ 1100.01. The goal of a chapter 11 case is confirmation of a reorganization plan that, to the extent provided in Section 1141 of the Bankruptcy Code, results in a discharge of dischargeable claims. Section 1141 of the Bankruptcy Code is the specific provision that governs the discharge of chapter 11 debtors. While the provisions of Section 1141 are broad and powerful, they are not unlimited. Consistent with the principle that the powers and jurisdiction of bankruptcy courts are limited to that expressly granted by Congress, Section 1141 does not discharge *all* claims against *all* chapter 11 debtors. Importantly, Section 1141 expressly provides that the discharge granted by that section is subject to the terms of the plan and the order confirming the plan. *See* 11 U.S.C. § 1141(c) and (d).

At confirmation in early 1993, the bankruptcy court reached two related conclusions that affect the scope of the discharge granted to Old-NGC and New-NGC in the Confirmation Order. First, the bankruptcy court concluded that Unknown Claims were not claims cognizable under the Bankruptcy Code and, as a result, the bankruptcy court held that constitutionally and jurisdictionally it could not discharge these claims or permanently enjoin the claimants who would later hold them. App., *infra,* 67a-68a. Second, the bankruptcy court held that it could transfer the operating assets to New-NGC free and clear of Bankruptcy Code claims only. Since the bankruptcy court had concluded that Unknown

Claims were not claims cognizable under the Bankruptcy Code, the bankruptcy court concluded that it could not and, therefore, did not transfer the operating assets free and clear of Unknown Claims. In the Confirmation Order, which takes precedence over the Plan and the asset purchase agreement, the bankruptcy court transfers the operating assets to New-NGC "free and clear of all liens, claims . . . to the maximum extend (sic) permitted by the Bankruptcy Code. " *Id.* at 22a. The qualifier at the end of this conveyance language specifically addressed the bankruptcy court's conclusion that it could not transfer the operating assets free and clear of Unknown Claims. Section 1141(c) of the Bankruptcy Code provides that the property dealt with by the Plan is free and clear of all claims except as otherwise provided in the Plan or in the order confirming the Plan. In this case, the Confirmation Order expressly held that future claims were not Bankruptcy Code claims and that the transfer of the assets to New-NGC was free and clear only of non-Bankruptcy Code claims.

As the bankruptcy court, the district court and Judge Reavley in dissent all recognized, the result of these two critical conclusions—that only Bankruptcy Code claims were discharged and that the assets were transferred to New-NGC free and clear only of Bankruptcy Code claims—is that New-NGC, as the reorganized operating entity and not some third party stranger to the chapter 11 case, received the operating assets subject to the Unknown Claims and retained liability to the Unknown Claimants to the same extent as National Gypsum.

In reaching the opposite conclusion, the panel, however, turned the Bankruptcy Court's jurisdictional and constitutional rulings on their head. According to the

majority, once the bankruptcy court had determined that it lacked jurisdiction over the Unknown Claims, it was powerless to "impose" liability for those claims on New-NGC. App., *infra*, 26a, 28a. The jurisdictional ruling in the Confirmation Order, however, leads to the exact opposite conclusion. The bankruptcy court's lack of jurisdiction over the Unknown Claims is not a limitation on its ability to "impose" those liabilities on New-NGC, but on its ability to *remove* them. The natural consequence of the bankruptcy court's 1993 jurisdictional ruling is not that these Unknown Claims are somehow magically imposed on New-NGC's hull, but rather that New-NGC is liable for the Unknown Claims because the bankruptcy court lacked authority to discharge them or to transfer National Gypsum's operating assets free and clear of them.

Notwithstanding the panel's concession that future asbestos claims were not discharged in the chapter 11 case—a conclusion that neither New-NGC nor anyone else has ever challenged and that unquestionably is the law of this case -- the panel concluded that those claims had, in fact, been effectively discharged *sub silentio* as a result of the structure of the confirmed Plan. This ruling elevates form over substance and, in doing so, clearly violates Sections 1141(c) and (d), which mandate that the terms of the Confirmation Order control the scope of any discharge and the extent to which property of the debtor's estate is transferred free and clear of claims.

B. By Elevating Form Over Substance, The Fifth Circuit Has Impermissibly Extended The Protections Afforded By Section 1141.

The Fifth Circuit's holding that New-NGC is a "new corporation" which has purchased the operating assets of

the Debtors without direct liability for the Unknown Claims ignores the economic realities of this bankruptcy case, and the impact of the Confirmation Order. This interpretation impermissibly extends the reach of Section 1141 and provides New-NGC with protections far greater than those permitted under the Bankruptcy Code. More importantly from a policy perspective, the rationale of the Fifth Circuit will encourage chapter 11 debtors generally to seek to avoid tort liability for past conduct through the simple expedient of establishing, through a plan, a new corporation that gains the benefit of the debtor's operating assets without the burden of its non-dischargeable tort liabilities. Neither the Bankruptcy Code nor the Plan or Confirmation Order allow such an inequitable result.

New-NGC is not a third party to this case. To the contrary, it is, for all practical purposes, the reorganized operating debtor under the Plan. It was created solely to hold the operating assets and continue the operating business of National Gypsum for the benefit of the Financial Creditors. Moreover, the Plan transaction involving New-NGC was not an arms-length third party purchase. In a typical third party purchase, assets of the debtor would have been exchanged for cash that would then have been available to satisfy the claims of all unsecured creditors on an equal footing. Here, assets of National Gypsum were merely segregated, albeit in a newly formed company, for the benefit of some but not all unsecured creditors.

To treat this transaction as a third-party purchase merely because it was effectuated by an asset purchase agreement elevates form over substance in disregard of Section 1141 and the rights of Unknown Claimants. In

reality, the asset purchase agreement, which was not the product of an arms-length negotiation and, in fact, was executed on behalf of both buyer and seller by the same person, was merely the means to effect the distribution to the Financial Creditors. This type of transfer to a debtor's creditors to implement a plan is specifically authorized under Section 1123(a)(5)(B) of the Bankruptcy Code. 11 U.S.C. § 1123(a)(5)(B). But, the nature of the transfer does not change the underlying character of the transaction nor does it entitle New-NGC to any greater discharge protection than is afforded any other reorganized debtor. Whether New-NGC is technically the reorganized debtor or not, it is certainly no third party purchaser and should not be held to have received protections upon emerging from the bankruptcy case that a bankruptcy court has no authority to grant to a debtor. The Fifth Circuit's holding, by distorting the economic realities of the Debtors' reorganization and elevating form over substance, effectively provides New-NGC a discharge that is far more expansive than the discharge that the bankruptcy court determined it had authority to grant and, pursuant to the provisions of Section 1141 of the Bankruptcy Code, did grant.

It is no answer to say, as the court below did, that New-NGC may be liable upon a showing of successor liability under state law. The doctrine of successor liability immunizes good faith purchasers of a bankrupt's assets, except in cases where the purchaser agreed to assume the seller's liabilities, or where the transaction was clearly designed to fraudulently evade creditors. *See* 8 *Collier in Bankruptcy* ¶ 1141.04(2). By relegating Unknown Claimants to state law successor liability principles, the Fifth Circuit effectively discharges these claims

because state successor liability law, in virtually all cases, imposes an insurmountable burden to recovery by these claimants—a burden which clearly did not exist before the chapter 11 case. In Texas, for example, implied successor liability has been eliminated by statute, and an acquiring corporation is not responsible for any liability of the seller that was not expressly assumed. Tex. Bus. Corp. Act Ann. § 5.10(B)(2); *see also Nissen Corp.* v. *Miller*, 594 A.2d 564, 620 (Md. 1991) (holding that the continuity of enterprise theory of successor liability "is the continuation of the *corporate entity* rather than continuation of the business operation," and refusing to adopt an exception that would attach liability for continuation of the business operation). In fact, New-NGC, not surprisingly, asserts that it is not liable to future asbestos claimants under the successor liability law of any jurisdiction.

C. The Fifth Circuit's Error Is Of Substantial Nationwide Importance

At a minimum, the panel's decision undermines the Plan and jeopardizes the availability of tort remedies for over 400,000 Unknown Claimants. Moreover, the decision has equally serious repercussions for future claimants in any asbestos-related bankruptcy and, indeed, in any bankruptcy involving a company with mass tort exposure.

Not only is the opinion below irreconcilable with Section 1141, it also creates a roadmap for circumventing the express protections for future claimants that Congress put in place by enacting Section 524(g) of the Bankruptcy Code in 1994. Section 524(g) provides that the claims of future asbestos claimants may only be dealt with in a bankruptcy case if the plan of reorganiza-

tion meets certain very specific requirements set forth in the statute. Specifically, Section 524(g) provides that bankruptcy courts may enjoin future asbestos claimants from pursuing a debtor only if those claimants have recourse to a plan-created trust that owns, or has the potential to own, a majority of the voting stock of the reorganized debtor. This provision ensures that future claimants will not be deprived of an effective remedy against the debtor.

The injunction authorized in Section 524(g) gives an operating company substantial protection from future asbestos claims, but only if the operating company is reorganized and the asbestos creditors have the ability, through their majority ownership of the reorganized operating entity, to participate in the success of the operations. The construction afforded the Plan by the court below, however, destroys any incentive for asbestos companies to use the Section 524(g) mechanism. By transferring its operating assets to a newly created entity owned by its financial creditors and leaving the asbestos creditors with a corporate shell containing a diminishing quantum of non-operating assets, asbestos companies will now be able to use the decision in this case to avoid giving up a majority equity stake in the true operating entity and to argue that the *shell* is the "reorganized" debtor, and that the shell alone retains direct liability for future asbestos claims.

By establishing a precedent that provides bankruptcy courts, and overreaching chapter 11 debtors, a vehicle to circumvent the requirements of Sections 1141 and 524(g), the court of appeals' interpretation of the Plan will substantially prejudice bankruptcy protections for mass tort victims and give bankruptcy courts a green

light to substitute their own *ad hoc* equitable judgment for the legislative judgment of Congress.

In Section 524(g), Congress evinced a clear preference for bright-line ground rules that force mass tort defendants to reorganize in a way that protects future claimants. The court below, however, effectively bestowed on bankruptcy courts the power to approve plan structures that effectively undermine the rights of future claimants and subvert the protections of Section 524(g).

If the decision below stands, *all* mass tort defendants could exploit the equitable jurisdiction of bankruptcy courts to do what New-NGC is attempting to do here: fashion a plan that allows them, *ex post*, to claim that a specially designed *liquidating* corporate shell is the statutory reorganized debtor, leaving a newly-created operating company free and clear of all tort liability. Future bankrupt corporations, particularly those facing substantial tort liability, will be able to adopt this strategy as a matter of course, enabling the reorganized entity to claim that successor-liability law shields it from all of its non-discharged obligations. The new, vibrant entity would be safe from future claims based on the debtor's pre-bankruptcy conduct, *regardless* of whether the liquidating debtor—an empty shell—received (or legally could receive) a discharge of those claims.[1] Secure in the ability to evade future claims through this ruse, companies would be less willing to remediate tortious activities.

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[1] Liquidating debtors are not entitled to a discharge under Bankruptcy Code Sections 1141(d) and 727.

In short, if a chapter 11 debtor can do what the Fifth Circuit approved here, a major victory will have been won for the manufacturers of dangerous products, at the expense of future mass tort victims. As just one example, tobacco manufacturers could, through a chapter 11 plan, transfer their assets to a freshly minted corporate shell, which would be owned by its current creditors. Future victims of smoking-related diseases would have no recourse against such an entity unless they could prove that it constitutes a successor corporation under the various state laws, a daunting task if the transaction is properly structured by the company's attorneys, and one that, at best, will yield highly disparate results for claimants located in different States. Such a distortion of the bankruptcy process cannot be reconciled with either the Bankruptcy Code or fundamental fairness.

II. The Court Of Appeals' Interpretation Of The Plan Violates The Due Process Rights Of Absent Persons

The interpretation of the Plan approved by the Court of Appeals not only violates Section 1141, it also wreaks havoc with the due process rights of Unknown Claimants. Applying constitutional and jurisdictional principles, the Bankruptcy Court, at the confirmation hearing on the Plan, held that the claims of Unknown Claimants were not discharged. This ruling has not been challenged in any court and is now the undisputed law of this case. Significantly, this ruling also provided the basis for the ruling by the bankruptcy court that no due process rights of Unknown Claimants were impacted by the confirmation of the Plan.

As discussed above, the Fifth Circuit's interpretation of the Plan, however, results in the effective discharge of

the claims of Unknown Claimants. This result violates the due process rights of Unknown Claimants in a way not previously countenanced by this Court and effectively renders meaningless the bankruptcy court's confirmation ruling that Unknown Claimants could not be impacted or enjoined by confirmation of the Plan.

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1998), this Court held that future asbestos claimants' rights cannot be extinguished by a settlement class action without "notice and opportunity to be heard" and "at a minimum" an opportunity for future asbestos claimants to opt out of the settlement class. 527 U.S. at 848. Any doubt about the need to protect future claimants was dispelled by the fact that Fibreboard used the trust to deny future asbestos claimants access to "virtually its entire net worth," which Fibreboard retained for itself (with the exception of its insurance policies, which were used to fund the settlement trust). *See id.* at 859-60. Given this fact, said the Court, "it hardly appears that such a regime is the best that can be provided" for future asbestos claimants. *Id.* at 860.

A. The Decision Below Effectively Extinguishes The Claims Of Future Asbestos Victims Against New-NGC

The due process requirements on which this Court relied in *Ortiz* do not die in bankruptcy. Although Congress, through adoption of section 524(g), has now spoken as to how due process can be satisfied relative to future asbestos claims in bankruptcy cases, when the bankruptcy court confirmed the Plan Congress had not yet spoken. The bankruptcy court concluded that due process concerns prevented the discharge or injunction of such future claims. Similarly, the bankruptcy court con-

cluded that it could only transfer the operating assets to New-NGC free and clear of current asbestos claims. Based on these rulings, which are now law of the case, none of the safeguards that other courts had required in the context of a pre-Section 524(g) discharge of future asbestos claims were necessary in this case. Because the absence of a discharge and injunction meant that the operating entity, New-NGC, had continued liability for Unknown Claims and because the operating assets were transferred to New-NGC subject to these claims, it was not necessary to give the asbestos claimants at least 50% of the ongoing ownership of the operating entity as these claimants had received in every other pre-Section 524(g) case where the asbestos claims were discharged and enjoined.[2]

Ironically, the Fifth Circuit, under the guise of protecting a "bargain" that was never struck, has provided New-NGC, which did not receive a discharge from future claims, with protection from lawsuits by future asbestos claimants that no other asbestos producers, even those that did receive discharges from future claims, have ever received. In the process, the Fifth Circuit has trampled the due process rights of the future claimants so assiduously protected by the bankruptcy court both in its decision on confirmation and in the decision on appeal here and by Congress in the enactment of Section 524(g).

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[2] Notably, because of the requirements of section 524(g), every case since the adoption of this section has also provided for the asbestos claimants to own at least 50% of the operating entity.

The claims possessed by future asbestos claimants here are just as amorphous and uncertain as those in *Ortiz*. And, as in *Ortiz*, those claims competed with the current claims of present asbestos claimants and others with current *liquidated* interests. The temptation to shortchange future claimants who were not present to assert their rights ran high—and, as this appeal demonstrates, has materialized. Like the settlement in *Ortiz*, the Plan kept the operating assets of the debtor (minus insurance policies) separate from the fund dedicated to satisfying asbestos claims. Unlike the settlement in *Ortiz*, however, the Plan as interpreted by the bankruptcy court and the district court preserved the rights of future claimants. To preserve these rights, the bankruptcy court accepted the Legal Representative's confirmation argument that the Plan could not bind future claimants and refused to discharge or permanently enjoin their claims. Now, over seven years after the Confirmation Order has become final and nonappealable, the Fifth Circuit, in violation of the due process rights of future claimants and without any of the procedural safeguards required by *Ortiz*, has rewritten the law of this case. According to the Fifth Circuit, the assets of New-NGC, the operating entity that emerged from the Plan, are effectively shielded from future asbestos plaintiffs. Under the Plan as construed by the Court of Appeals, these claimants have no effective recourse when, as is expected to occur, the Trust is able to pay at most only a fraction of the value of their claims. To recover against New-NGC, these claimants will have to convince a court that New-NGC can be held liable under varying successor liability principles, an additional, material hurdle that these claimants would not have been required to jump if National Gypsum's reorganization had merely followed

the more traditional route of continuing the operating business in Old-NGC.

B. The Court of Appeals' Error Is Of Substantial Nationwide Importance

The asbestos crisis has posed difficult questions, of the highest order, about the role of the judiciary and the rights of litigants. Prior to *Amchem v. Windsor Corp.*, *supra,* and *Ortiz*, lower federal courts attempted to fashion solutions to these questions through the creative use of the class action device. That experiment, however, proved inimical to the statutory and constitutional rights of asbestos litigants. Its demise has "created a vacuum which other practitioners of dispute resolution, like bankruptcy specialists" will be eager to fill. Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?,* 76 Tex. L. Rev. 1695, 1702 (1998).

But if the arena in which the questions posed by mass tort litigation has changed, the issues at stake have not. Indeed, in some ways, bankruptcy presents even more of a threat to the rights of asbestos claimants, and even more potential for judicial overreaching.

Bankruptcy proceedings, which are designed to deal with the economic realities of ordinary commercial insolvency, not the due process challenges of modern mass tort litigation, do not carry with them the carefully crafted safeguards that Rule 23 provides. This is precisely why Congress enacted Section 524(g) to deal with future asbestos claims, and precisely why this Court should consider unacceptable the Fifth Circuit's decision below. If the holding of the Court of Appeals is allowed to stand, the due process protections Congress intended

to put in place with the enactment of Section 524(g) will be emasculated and mass tort victims will be left with little more than the equitable dispensation of the bankruptcy court for protection.[3]

Mass tort litigation will gravitate toward bankruptcy as an inevitable result of this Court's shutting the door on abusive class action "settlements." Indeed, at least five former asbestos manufacturers have filed for bankruptcy since the beginning of 2000. *See* Kim, "G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases," Wall St. J., Jan. 8, 2000, at B12. Accordingly, the need for vigilance increases. The bankruptcy court and the district court displayed vigilance by logically and consistently applying the law of the case and looking past structure to the substance of the bankruptcy transaction at issue. They concluded that the confirmation decision not to discharge and enjoin future claims would be rendered meaningless and superfluous if these claims could magically be scraped from New-NGC's hull by virtue of the form of the reorganization. The Fifth Circuit, on the other hand, failed to be vigilant in this case, and treated this dispute as a routine exercise in contractual interpretation. It is nothing of the sort. The asset purchase agreement at issue is not a true third party asset sale agreement; rather, it is merely the procedural mechanism by which the Financial Creditors received their distribution under the Plan. The crux of this dispute is not about contract interpretation, but rather about

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[3] Section 105 of the Bankruptcy Code generally grants the bankruptcy courts equitable power to issue any order "that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

form over substance and the due process rights of future claimants. Yet, form should not be elevated over substance to create dangerous precedent, undermine the law of the case and allow New-NGC and any other clever mass tort defendant "to shoehorn mass tort litigation into a coercive, collective [after-the-fact] settlement" that serves the interests of favored creditors at the expense of asbestos victims. *See* Jones, 76 Tex. L. Rev. at 1722.

If upheld, the only immediate beneficiaries of the decision below—other than New-NGC and its stakeholders (*i.e.*, the non-asbestos creditors)—will be bankruptcy courts and overreaching chapter 11 debtors, which will have been given a green light to use the "raw [discretionary] power conferred by the automatic stay, the truncation of traditional litigation procedure, the cramdown of dissenting classes and creditors, the pressure of multiparty bargaining, and channeling injunctions" to deal with one of the most pressing problems of contemporary tort law. *Id.* at 1722. Whether this is the *proper* role for bankruptcy courts, however, is a decision for Congress and not courts to decide. *See Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring) (the "'elephantine mass of asbestos cases' . . . cries out for a *legislative* solution") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10758

In The Matter Of: NATIONAL GYPSUM COMPANY;
AANCOR HOLDINGS INC.

Debtors.

THE NEW NATIONAL GYPSUM COMPANY

Appellant,

v.

THE NATIONAL GYPSUM COMPANY
SETTLEMENT TRUST,

Appellee.

No. 99-10760

In The Matter Of:
NATIONAL GYPSUM COMPANY

Debtor.

NATIONAL GYPSUM COMPANY,

Appellant,

v.

NGC SETTLEMENT TRUST; THE ASBESTOS
CLAIMS MANAGEMENT CORPORATION,

Appellees.

Appeals from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

[Filed December 5, 2000]

(Opinion 7/18/00, 5th Cir., 2000, 219 F.3d 478)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

Judges Higginbotham and Barksdale did not participate in the consideration of the petition for rehearing en banc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10758

In The Matter Of:
NATIONAL GYPSUM COMPANY AND
AANCOR HOLDINGS INC.,

Debtors.

THE NEW NATIONAL GYPSUM COMPANY,

Appellant,

VERSUS

THE NATIONAL GYPSUM COMPANY SETTLEMENT TRUST,

Appellee.

No. 99-10760

In The Matter Of:
NATIONAL GYPSUM COMPANY,

Debtor.

NATIONAL GYPSUM COMPANY,

Appellant,

VERSUS

NGC SETTLEMENT TRUST AND
THE ASBESTOS CLAIMS MANAGEMENT
CORPORATION,

Appellees.

Appeals from the United States District Court
for the Northern District of Texas

July 18, 2000

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In 1993, the bankruptcy court entered an order (the "Confirmation Order") confirming the joint chapter 11 plan of reorganization (the "Plan") of Aancor Holdings, Inc. ("Aancor"), and its wholly-owned subsidiary, National Gypsum Company ("Old-NGC"), and approving certain plan documents. As a result of the bankruptcy reorganization, National Gypsum Company ("New-NGC") was created as a new Delaware corporation. Four years later, the NGC Settlement Trust (the "Trust") and its subsidiary, formerly Old-NGC and now called Asbestos Claims Management Corporation ("ACMC"), filed this declaratory judgment action in bankruptcy court, seeking a determination that, under the Plan, New-NGC was liable for any unknown asbestos disease claims (the "Unknown Claims") arising from Old-NGC's torts and not resolved by the Trust.

Following an adversary hearing, the bankruptcy court delivered a bench ruling in which it concluded that under the Plan, New-NGC was liable for Unknown Claims the Trust could not satisfy. New-NGC appealed to the district court, which affirmed. Concluding that the Confirmation Order and other plan documents do not

transfer liability for these Unknown Claims from Old-NGC to New-NGC, we reverse and remand.

I.

In October 1990, Old-NGC and Aancor filed petitions, later consolidated, for relief under chapter 11 of the Bankruptcy Code. Old-NGC faced two key groups of creditors: Unsecured bond and trade creditors that were owed approximately $1.1 billion, and asbestos-related claimants who had an estimated $127 million due for pending claims and projected future disease claims of $695 million to $764 million.

The bankruptcy court appointed committees to represent the holders of the unsecured bond and trade claims (the "BT Committee") and the asbestos claims (the "Asbestos Committee") and a legal representative to represent holders of Unknown Claims. After selling some of its assets, Old-NGC retained two of its subsidiary businesses: the Gold Bond Building Products division ("Gold Bond"), which produces and sells gypsum and wallboard-related products, and the Austin Company ("Austin"), a design, engineering, and construction firm. Old-NGC also retained insurance coverage ("Insurance") available to pay some asbestos claims.

Old-NGC, the Asbestos Committee, and the BT Committee agreed on how Old-NGC's assets would be used to pay commercial and asbestos claims. Commercial creditors would receive Gold Bond, and asbestos claimants would receive Old-NGC and its assets, including Austin, the Insurance, certain insurance-related claims, and $ 10 million from New-NGC. Under a draft plan of reorganization (the "Draft Plan"), Aancor, the parent debtor, would be merged into Old-NGC, with

Old-NGC as the surviving entity. Old-NGC was to be renamed Asbestos Claims Management Corporation, and two new entities were to be created, the Trust and New-NGC. The Draft Plan was approved by the necessary classes of commercial creditors and both classes of asbestos creditors.

Under the Draft Plan, New-NGC, a new Delaware corporation, would purchase from Old-NGC the operating assets and business of Gold Bond, including the name "National Gypsum Company." The commercial creditors then would look to New-NGC, while the asbestos claimants would look to the Trust.

Because under the Draft Plan the commercial creditors would own New-NGC, worth approximately $350 million, and because they had, in return, agreed to extinguish over $1 billion in claims against Old-NGC, the commercial creditors also requested a permanent injunction, in the Confirmation Order, protecting New-NGC from future and Unknown Claims, to maximize the value of New-NGC's securities in the public markets by removing any taint from the possibility of asbestos-related liability. Thus, the Draft Plan provided not only that the Trust would be established and would assume sole responsibility for all asbestos claims, including Unknown Claims, but also that the Confirmation Order would contain a "channeling order and permanent injunction" that would channel all asbestos claims to the Trust and forever would bar the assertion of any asbestos claims against New-NGC.

The Draft Plan also provided for the formation of the Trust, which would retain Austin (valued at approximately $125 million), the Insurance (worth between $300 million and $600 million, depending on how pend-

ing coverage litigation was resolved), certain other insurance-related claims, and a $10 million cash payment from New-NGC. As a result, the Draft Plan made it likely, but not a certainty, that the Trust assets would be sufficient to pay all present and future asbestos diseases claims, particularly if the settlement in the related litigation in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), were approved.

This payment-in-full was to be accomplished through a joint defense facility, the Center for Claims Resolution ("CCR"), established in 1988 by Old-NGC and nineteen other former asbestos companies. CCR set up an administrative compensation system that, in most cases, would replace judicial resolution of asbestos claims; this facility was subject to approval in the *Georgine* settlement.[1] Regardless of the level of funding that ultimately would be available for these claims, however, the Trust was required to give all claims, whether current or unknown, "substantially equivalent" treatment.

If the then-pending *Georgine* settlement were not approved, the Draft Plan included a back-up option that required the Trust to implement the "Alternate Asbestos Disease Claims Resolution Facility" (the "Alternate Facility"), which would provide for the ratable distribution of Trust assets to all projected asbestos claimants. A claimant would receive a percentage of the liquidated value of his claim, calculated by dividing the value of Trust assets by the projected amount of all future liabili-

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[1] *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 599-605 (1997) (describing the CCR's system for settling and compensating asbestos-related claims).

ties. The Alternate Facility was designed, therefore, to preserve "sufficient resources to pay future valid [asbestos claims] on a substantially equivalent basis."

The Draft Plan was submitted to the bankruptcy court for approval. The legal representative of the Unknown Claimants opposed the provision for a permanent injunction, fearing that New-NGC would not assume even non-asbestos-related claims arising post-petition and that, as a result, those obligations might have to be born by Old-NGC or the Trust.

Following hearings on asbestos issues in January 1993, the bankruptcy court decided that it lacked jurisdiction to enjoin permanently or to discharge Unknown Claims. It reasoned that persons who had not yet suffered an injury that was cognizable under applicable non-bankruptcy law did not hold "claims" within the meaning of section 101(5) of the Bankruptcy Code. The court also concluded, however, that it did have the power to enter a temporary injunction that would require Unknown Claims first to be exhausted from the Trust before the claimants asserting them could pursue remedies against any other person, including New-NGC.

Because they were uncertain how to re-draft the injunctive language, the parties in February 1993 addressed to the bankruptcy court the issue of the temporary injunction and New-NGC's potential liability for any Unknown Claims. The court, however, was unwilling to take a position on whether New-NGC would be liable in the future for the Unknown Claims, noting that this liability should be decided according to non-bankruptcy law and that New-NGC could defend any future suits by claiming that it was not a successor to the debtors' liabilities.

As a consequence of the January 1993 decision and the February 1993 hearing, the Draft Plan was modified to eliminate the permanent injunction against Unknown Claims, though that injunction would be in effect against current asbestos claims. In March 1993, Old-NGC proposed the Third Technical Modifications to the Plan, which changed the Draft Plan (1) by drawing a distinction between current claims and Unknown Claims to exclude Unknown Claims from the discharge and (2) by removing the permanent injunction against Unknown Claims and replacing it with the more limited "Channeling Order and Injunction."

The BT Committee objected, arguing that this was a substantial change from the Draft Plan that would permit the Unknown Claims to be litigated against New-NGC after remedies against the Trust had been exhausted. The bankruptcy court rejected this objection, however, and approved the Third Technical Modifications, reasoning that the changes to the Draft Plan did "not adversely change the treatment under the Plan of any [creditor]."

As approved, then, the Plan provided, in pertinent part, that current asbestos claimants were permanently enjoined from ever suing any person other than the Trust, including New-NGC. Unknown Claimants were neither discharged nor permanently enjoined but were "made beneficiaries of the [Trust] and, pending exhaustion of the remedies of the [Trust] to resolve Unknown Claims, are enjoined" from pursuing litigation against any person, including New-NGC. This temporary injunction is referred to throughout the Plan, Confirmation Order, and briefs as the "Channeling Order."

The modifications to the Plan did not alter the previous Draft Plan's section that provided that New-NGC would not assume asbestos liabilities of Old-NGC: "Upon consummation of the Merger and this Plan, New-NGC shall perform all of the obligations of the Debtors under this Plan (except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the [Trust])." "Asbestos Claims" were defined to include both current and Unknown Claims. Likewise, the Confirmation Order included a detailed description of the Channeling Order and reiterated that "New-NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims pending exhaustion of the remedy or remedies provided by the [Trust]."

Finally, the assets of Old-NGC were transferred to New-NGC pursuant to an asset purchase agreement (the "APA"). The APA was expressly approved by the bankruptcy court's Confirmation Order and provided that New-NGC would not assume any asbestos-related liabilities, including Unknown Claims. In July 1993, the Plan was substantially consummated, and New-NGC issued to commercial creditors its securities, which subsequently were traded in the public markets.

In May 1996, the Third Circuit set aside the *Georgine* settlement, and the Supreme Court affirmed that decision in *Amchem,* 521 U.S. at 629. This led directly to the filing of the present lawsuit—the Trust alleged that because it could no longer participate in the CCR facility, its assets would be insufficient to pay full tort values to all asbestos disease claimants. The Trust, as a result, looked for alternate funding for asbestos claimants and sought a determination that "the Plan Docu-

ments indicate New NGC has liability for the asbestos liabilities of Old NGC." Specifically, the Trust contended that the bankruptcy court's 1993 denial of the permanent injunction, the entry of the Channeling Order, and the findings made in support of those decisions indicated that New-NGC was liable for the Unknown Claims.

The bankruptcy court agreed with the Trust, stating that "the plan as confirmed by order of this court implicitly imposes or maintains liability on New-NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust." The court explained why this result was only "implicit":

> By implicitly addressing this asbestos liability, rather [than] explicitly doing so, and by deferring the matter as provided in the plan, the court enabled New NGC to emerge in the marketplace post-confirmation as an effective entity, poised, under the right market conditions to prosper, and thereby benefit all the constituencies.

In affirming the bankruptcy court, the district court acknowledged that "when viewed in isolation, certain provisions of the Confirmation Order, the Plan and the [APA] arguably support the Appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims." Nevertheless, the district court concluded that those provisions should be read in the context of the entire Plan, and it agreed that implicit in the Confirmation Order was the idea "that if the Trust had insufficient assets to satisfy the unknown claims, those claimants could look to New NGC."

II.

New-NGC asserts that the Trust is not the real party in interest and, in a related argument, that the Trust does not have standing to seek the determination that New-NGC is liable for Unknown Claims. First, New-NGC argues that the real parties in interest are any potential Unknown Claimants who first exhaust Trust remedies without having their claims resolved, then obtain a judicial termination of the Channeling Order as to their claims, and finally bring their claims against New-NGC in non-bankruptcy courts based on applicable state law. New-NGC points out that no such claimants yet exist.

New-NGC asserts that the Trust has no substantive rights of its own against New-NGC, because the Plan and Confirmation Order contemplate that the Trust retain liability for *all* asbestos claims until its assets are exhausted. Thus, New-NGC reasons that because the Trust has no rights under substantive law against New-NGC, New-NGC cannot be the real party in interest.[2]

The Trust properly points out, however, that the real party in interest is "not necessarily the person who will ultimately benefit from the recovery." *See Farrell*, 896 F.2d at 140. Because the Plan charges the Trust with the ongoing duty of distributing the assets of the estate to the asbestos creditors, the substantive right the Trust seeks to be enforced is the right to have the bankruptcy court interpret and construe the Confirmation Order,

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[2] *See Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990) ("[A] party not possessing a right under substantive law is not the real party in interest with respect to that right and may not assert it.").

Plan, and plan documents regarding matters as to which there is a substantial and immediate controversy.

Without the bankruptcy court's interpretation of the meaning of the Plan, the Trust will be faced with a fiduciary dilemma, in that it will be uncertain how to treat its beneficiaries, the Unknown Claimants. This dilemma exists because the trustees cannot know whether these future claimants ultimately will have a remedy against New-NGC, and, as a result, the trustees cannot know, with any certainty, whether the Trust must reduce the current pro-rata distribution under the Alternate Facility.

Therefore, the Trust properly has brought the current declaratory judgment action seeking a determination of whether, under the Confirmation Order and Plan, it can count on New-NGC to pay any of the Unknown Claims. Accordingly, the Trust is a real party in interest and has standing.

III.

A.

The parties dispute the standard of review of the bankruptcy court's interpretation of its 1993 Confirmation Order. New-NGC argues that because the interpretation of a court order is purely a question of law, our review must be *de novo*.[3]

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[3] *See In re Schimmelpenninck*, 183 F.3d 347, 354 (5th Cir. 1999) (holding that in reviewing a bankruptcy court's order, we should perform "the same task as did the district court: review the bankruptcy court's findings of fact for clear error and issues of law de novo").

The Trust responds by arguing that a court's interpretation of its own order should be entitled to deference if it is not plainly contradicted by the Plan documents.[4] The Trust notes that the bankruptcy court presided at the confirmation hearings, considered the relevant factual and legal arguments, made extensive findings and conclusions in connection with confirmation, and so developed a comprehensive understanding of the Plan. Thus, the Trust urges that a deferential standard is "eminently proper."

The proper reconciliation of these two positions is that we should review *de novo* the purely legal issues—e.g., the effect of the documents on New-NGC's liability for Unknown Claims—but should defer to the bankruptcy court's reasonable resolution of any ambiguities in those documents. Because New-NGC is correct that the bankruptcy court's ultimate determination of the meaning of the Plan and Confirmation Order is a legal one, however, the documents must truly be ambiguous, even in light of other documents in the record, before we will defer.

B.

New-NGC argues that the district court erred in deciding that the Plan provided that New-NGC would be held liable for any Unknown Claims that are unresolved following exhaustion of the Trust's assets. New-NGC asserts that rather than being liable under the bankruptcy Plan, it should be liable only if an asbestos claimant can

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[4] *See County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1115 (2d Cir. 1997).

overcome the additional hurdle of proving successor liability under applicable state law.

In adopting the Trust's position on this issue, the bankruptcy court admitted that there are no express statements in the Plan or Confirmation Order that affirm New-NGC's liability. Nevertheless, the court found such liability "implicit" in the Plan, reasoning that because it previously had rejected a permanent injunction against Unknown Claims, "the only reading that gives meaning to [the] findings of fact and conclusions of law [is] that this plan as confirmed by this court contemplated New NGC liability for claims not paid by the Trust and not otherwise discharged."[5]

The district court affirmed because, as it explained, the Confirmation Order stated that

> New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Claims *pending exhaustion of the remedy or remedies provided by the [Trust].* The clear implication of this statement is that once the [Trust] is exhausted, Unknown Claimants may commence litigation against [New-NGC].

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[5] In addition to challenging the underlying interpretation, New-NGC argues that it is never proper for a bankruptcy court to make an "implicit" ruling, particularly where that ruling conflicts with other express statements in the Plan. While this argument is thus styled as a separate ground for reversal, it relies wholly on the conclusion that the underlying interpretation is wrong. As a consequence, we need not address it separately.

(Internal citations omitted.) In defending the bankruptcy court's and district court's decision, the Trust also argues that we should view New-NGC's current position as an attempt to relitigate the issues that were squarely presented to, and expressly rejected by, the bankruptcy court in the 1993 Plan and confirmation proceedings. The Trust points out that the 1993 order was never appealed and is, therefore, the law of the case.

But just because the Confirmation Order and Plan are binding does not answer the more difficult question of what those documents mean. Our duty is to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown Claims. In this respect, New-NGC correctly notes, as an initial matter, that there are at least three positions the Plan could have adopted: (1) New-NGC could be immune from Unknown Claims; (2) New-NGC could be liable for Unknown Claims that were not resolved by the Trust, but only to the extent of state law successor liability; or (3) New-NGC could have been liable for all Unknown Claims once the Trust was exhausted.

The bankruptcy court rejected the first of these positions when it determined that it did not have jurisdiction permanently to enjoin Unknown Claimants from suits against New-NGC. The bankruptcy court, district court, and the Trust make an immediate leap from the rejection of this first position to an adoption of the third position as the one "implicit" in the 1993 orders. This leap is apparent in the Trust's argument that because the commercial creditors' BT Committee opposed the Channeling Order and its temporary injunction, they

> knew that under the confirmed Plan New-NGC would be liable for Unknown AD Claims to the extent, if any, that the Trust proved unable to resolve those Claims. Indeed, they objected (unsuccessfully) to NGC's third Technical Modifications on this very ground, asserting that the modification would subordinate the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos liability.

The Trust's conclusion does not flow inevitably, however, from the commercial creditors' objections. It is possible that these creditors were objecting to the imposition on New-NGC of *any* risk of liability, including the (apparently) smaller risk of successor liability under state law. Because the previous Draft Plan would have provided New-NGC with *absolute* immunity from *all* asbestos claims, either the second or third interpretations would represent a less desirable reorganization plan for these creditors, and either would have motivated them to object.[6] Thus, New-NGC argues that it was erroneous for the bankruptcy court to treat the failure to create a

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[6] The dissent ignores this observation, thereby reflecting same error as did the bankruptcy court, the district court, and the Trust, stating that "over the protest of Gypsum creditors who would own the New-NGC the bankruptcy court refused to protect it from future unknown claims." Like the Trust, however, the dissent assumes this conclusion solely from the fact that the court rejected a permanent injunction against Unknown Claims, and it fails to point to any language in the approved Plan or Confirmation Order that indicates that New-NGC, instead of accruing the more limited form of state-law successor liability, would be liable for all Unknown Claims once the Trust was exhausted.

permanent injunction against future asbestos claims as the equivalent of imposing liability for those claims on New-NGC.

Likewise, the isolated statements pointed to by both parties do little to resolve the interpretive question. The Trust emphasizes a statement contained in the transcript from the January 1993 bankruptcy ruling that "Non-Bankruptcy Code claimants must be able to pursue their remedies in the future after the exhaustion of the trust." But once again, either the second or third interpretation would be consistent with this statement, for the court could have intended that state-law successor liability would be sufficient, or, alternatively, the court could have been referring to an immediate liability on exhaustion of the Trust.

Somewhat more informative are statements New-NGC points to from the February 1993 hearing, wherein the court specifically addressed the issue of New-NGC's liability for Unknown Claims should the Trust be exhausted, noting:

> The Court has already provided that if these future claimants are [not] satisfied, there is no permanent injunction and then that triggers the dispute is new NGC *a successor*, what liability is there under whatever the *applicable corporate law* would be.... My concern is if you start getting into the dispute on document drafting, you will be necessarily changing by corporate document what the Court would anticipate would just be whatever the application is of the *appropriate jurisdiction statute*.... My only concern is if you're not in dispute as to what to put on any document with a new entity, maybe

> that's simply left better to the application of *whatever governing law would be, nonbankruptcy governing law*, in the event that there's anything to fight about, in the event that some claims in the future . . . they can proceed with their rights, and new NGC can *defend and say we're not a successor*.

(Emphasis added.) New-NGC asserts that these discussions form the context for the final version of the Plan, the Confirmation Order, and the APA and that the bankruptcy court's comments reflect its understanding, at that time, that even though there would be no permanent injunction preventing Unknown Claimants from seeking damages from New-NGC if the Trust were exhausted, nevertheless those claims against New-NGC would still have to meet the requirements for state-law successor liability.

The Trust downplays these comments, suggesting they are merely part of a discussion about what was then a completely speculative and hypothetical event (the likelihood that the Trust would ever be exhausted). It argues that these statements cannot, as a matter of law, substitute for what is in the Confirmation Order and Plan. The Trust is correct that the Plan and Confirmation Order form the basis of the binding agreement between the debtors and creditors, and any determination of the extent of New-NGC's liability for the Unknown Claims must flow from those documents. Nonetheless, where there is ambiguity in the documents, and especially where there is a dispute as to what the parties understood them to mean, extrinsic evidence such as this should inform our analysis.

That notwithstanding, the best indication of the bankruptcy court's intent with respect to these Unknown Claims still can be found in the documents themselves. First, and most importantly, New-NGC points to the Channeling Order, because it is the disputed provision that represents the most significant modification of the Draft Plan. The Channeling Order provided as follows:

> Channeling Order—Unknown Disease Claims.
>
> (1) Injunction and Channeling Order.
>
> Pursuant to Section 6.5(b) of the Plan, all Persons who have held, hold, or may hold Unknown Asbestos Disease Claims are made beneficiaries of the [Trust] and, pending exhaustion of the remedies of that Fund to resolve Unknown Asbestos Disease Claims, are enjoined (subject, however, to the provisions of Section 10(b)(2) of this Order) on and after the Confirmation Date from . . . commencing or continuing in any manner any action or other proceeding of any kind with respect to such Unknown Asbestos Disease Claim against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, *or any other Person* . . . .
>
> (2) Limitations on Injunction and Channeling Order Regarding Asbestos Disease Claims. Nothing contained in Section 10(b)(1) of this Order, however, shall preclude an Unknown Asbestos Disease Claimant from pursuing his rights, if any, *under applicable non-bankruptcy*

> *law against any Person* who may be liable to such Unknown Asbestos Disease Claimant after exhausting the remedy or remedies provided by the [Trust].

(Emphasis added.)

New-NGC points to the quoted language for its conclusion that Old-NGC's tort liability to non-Code claimants does not attach automatically to New-NGC. Specifically, New-NGC notes that section 10(b)(2) covers *any* "Person," not just New-NGC, and that the rights of Unknown Claimants are limited to "rights, if any, under applicable non-bankruptcy law." New-NGC argues that, as a result, because the Trust must recognize that no automatic liability arose against all "Persons,"[7] therefore the Trust must argue that the Channeling Order somehow designated that only New-NGC would automatically succeed to Old-NGC's liabilities. But as the plain language of that order reflects, nothing in these provisions singles out New-NGC for special treatment, and New-NGC instead is dealt with in § 10(b)(2) the same as is any other Person.

New-NGC correctly observes that, consequently, the only sensible reading is that all Persons, including New-NGC, were exposed to the possibility that Unknown Claimants might some day be allowed to pursue a remedy against them *if one existed under applicable non-bankruptcy law*. In contrast, the Trust's reading would lead to the unlikely conclusion that the bankruptcy court

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[7] Significantly, "Person" is defined broadly, under the Plan, as "any individual, firm, corporation, association, partnership, joint venture, trust, or other entity."

intended that all "Persons" would be automatically liable if the Trust's assets were exhausted.

The next provision pointed to by New-NGC is section 6 of the Confirmation Order, which expressly approves the APA and orders that the assets sold thereunder are to be transferred to New-NGC "free and clear of all Liens, Claims, Interests and other liabilities, obligations, charges or encumbrances thereon or thereagainst . . . to the maximum extent permitted by the Bankruptcy Code." Because New-NGC, a newly-created corporation, cannot automatically succeed to the liability of Old-NGC without some affirmative act (whether explicit or implicit) of the bankruptcy court, this provision further supports New-NGC's argument that the bankruptcy court never intended to take such necessary action to transfer liability.

In fact, the natural inference from this provision is that the court intended New-NGC to assume only "Liens, Claims, Interests and other liabilities" that were *specifically* assigned or transferred in other parts of the Confirmation Order; otherwise, New-NGC would be "free and clear . . . to the maximum extent permitted by the Bankruptcy Code." The plain language of the Confirmation Order therefore refutes the bankruptcy court's finding of "implicit" liability.

As further support for its position, New-NGC notes that section 5.2(d) of the Plan provides that New-NGC is not responsible for asbestos liabilities: "Upon consummation of the Merger and this Plan, New-NGC shall perform all of the obligations of the Debtors under this Plan (*except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the [Trust]*." (Emphasis added.) "Asbestos Claims" are de-

fined in the Plan to include both current and Unknown Claims.

Finally, for textual support, New-NGC relies on provisions of the APA, which were approved by the bankruptcy court in the Confirmation Order. Section 2.1(b) of the APA states that New-NGC will not have liability for any asbestos claims (including Unknown Claims): "Exclusions to Assumptions. Notwithstanding anything contained in this Section 2.1 to the contrary, [New-NGC] shall not assume, covenant to pay, perform, observe the terms of, satisfy and/or discharge any liability or obligation of [Old-NGC] to the extent such liability and obligation: (i) relates to Asbestos Claims. . . ." The APA adopted the definition of "Asbestos Claims" in the Plan, and, as we have said, that term includes Unknown Claims.

In challenging all these statements supporting New-NGC's position, the Trust relies primarily on the same reasoning as did the district court, which felt these statements and provisions are taken out of context and do not reflect a coherent reading of the documents as a whole.[8] As the court stated,

> When viewed in isolation, certain provisions of the Confirmation Order, the Plan and the Asset

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[8] Notably, the dissent also offers no theory of how or why we should ignore the plain language of the Plan documents to reach the result desired by the Trust. Instead, the dissent criticizes the majority for having "chosen their own meaning of the 1993 order," but it does not tell us what is erroneous about our interpretations of the Channeling Order, section 6 of the Confirmation Order, section 5.2(d) of the Plan, or section 2.1(b) of the APA.

> Purchase Agreement arguably support the appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims. However, as the bankruptcy court explained, "the plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. The plan and its implementing documents cannot be read to render any provision of the confirmation order meaningless or superfluous."

(Internal quotations omitted.)

In so stating, the district court erred in at least two respects. First, New-NGC does not claim that it "emerged from the bankruptcy proceedings without any liability for unknown asbestos claims." Although this was the first of the three positions the bankruptcy court could have taken, all sides acknowledge that that option was expressly rejected when the permanent injunction was denied. Instead, New-NGC takes a more restrained position, asserting that it emerged with a more limited form of liability, state-law successor liability.

Second, the bankruptcy court's and district court's desire to avoid "rendering any provision of the confirmation order meaningless or superfluous" is commendable, but that interpretive tool leads to a conclusion opposite to the one those courts reached. To reject the multiple statements advanced as support by New-NGC as contrary to the "implicit" meaning of the Confirmation Order is to render *those* statements meaningless or superfluous. In contrast, neither the Trust nor the bankruptcy or district court has pointed to language that

would be superfluous under New-NGC's more modest reading of successor liability.

The district court decided that New-NGC's theory would render the entire Channeling Order meaningless, reasoning that "if New NGC was not to have any liability for unknown asbestos claims, the channeling order would have been unnecessary." But once again, this logic is built on the faulty premise that New-NGC is arguing for absolute immunity. As we have shown, the rejection of the permanent injunction, followed by imposition of the Channeling Order, is just as consistent with the theory that the bankruptcy court wanted to impose at least state-law successor liability on New-NGC. Our textual analysis of the Channeling Order demonstrates that the state-law-successor-liability theory was the most reasonable interpretation.

Similarly deficient is the district court's conclusion that because "the Confirmation Order barred punitive damages by unknown asbestos claimants against New-NGC, this indicates that the order contemplated that New-NGC would be liable for other types of damages." While this statement is correct, it does nothing to undermine New-NGC's state-law-successor-liability theory; the bankruptcy court simply may have been closing the door to punitive damages even under the more limited form of non-bankruptcy-law liability.

On the other hand, the Trust may be correct that the bankruptcy court's bar on punitive damages evinces an intent on the court's part to impose liability on New-NGC. That is, if the court intended to leave all questions of New-NGC's liability to state-law successor doctrine, it might seem odd that it would express any opin-

ion on whether punitive damages could be recovered under state law.

But to the extent that this observation about intent is correct, we should nevertheless reject it as a matter of law. This is so because once the bankruptcy court had determined that Unknown Claims were not "claims" within the meaning of § 101(5) of the Bankruptcy Code, it no longer retained jurisdiction to limit punitive damages awards in favor of these claimants.[9]

New-NGC correctly notes that it is inherently inconsistent for the bankruptcy court to rule that it is without the power permanently to enjoin Unknown Claims because they do not fit within section 101(5), but then to hold, nevertheless, that New-NGC will be liable for those claims once the Trust is exhausted. This impermissibly benefits Unknown Claimants, who do not hold Code claims, in relation to other non-Code creditors, who would have to prevail under state-law successor theories. Similarly, the district court's bar on punitive damages for Unknown Claims impermissibly disadvantages Unknown Claims relative to other non-Code creditors who are free to pursue punitive damages. Thus, we

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[9] The dissent argues that this "is a curious response to the obvious point that the bankruptcy court is assuming the same liability of New-NGC in the channeling facility, rather than contemplating 'state-law' litigation." But the dissent misses the point that the bankruptcy court could not impose liability on New-NGC for Unknown Claims, which were not properly within the bankruptcy system at all. Thus, even if the bankruptcy court were not contemplating "state-law" litigation, it did reason that it had no jurisdiction over future claims, and, accordingly, those claims should be handled outside of bankruptcy.

reject the argument that the punitive-damages bar has any bearing on New-NGC's liability for Unknown Claims, which were determined to be outside of the bankruptcy court's power to enjoin.

In a failed attempt at its own textual analysis, the Trust argues that because the court recognized that "New NGC may transfer additional assets to the Trust in the future," therefore this right to add funds would make sense only if New-NGC also has liability for the Unknown Claims. New-NGC cogently points out, however, that the right to add funds is a recognition not that New-NGC would retain liability for Unknown Claims, but instead that it provides New-NGC an option to shield itself even from successor liability.

If New-NGC determines that it would be better off funding the Trust than defending against future state-law asbestos claims,[10] the Plan affords it this option. The court's statement is consistent, therefore, with New-NGC's theory that the bankruptcy court believed that New-NGC might want to retain the ability to extend the temporary injunction by continuing to fund the Trust.

Thus, the Trust and district court point to no provisions of the Confirmation Order or the Plan that lead to the conclusion that New-NGC was necessarily to be liable for the Unknown Claims should the Trust fail to satisfy them. Neither attempts to argue for alternative interpretations of the provisions set forth by New-NGC; instead, they rely solely on their theory that these are

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10 For example, New-NGC may determine that its expected costs of litigation exceed the amount of funding needed to ensure continued viability of the Trust.

mere "isolated" statements in the documents. New-NGC, on the other hand, points to multiple statements in the record, and numerous provisions in the relevant documents, that are consistent *only* with its position that it should not be liable to the Unknown Claims unless they can establish state-law successor liability.

Proper textual interpretation does not allow us to ignore those statements or to adopt an "implicit" meaning that would render all these provisions meaningless, and we need not defer to the bankruptcy court's interpretation of this unambiguous text. Nor does our interpretive role require us to ignore other extrinsic evidence, such as the bankruptcy court's discussion of non-bankruptcy law and successor liability, that is consistent with the text.

In light of the Plan and Confirmation Order, then, it is unlikely that the bankruptcy court intended that non-Code claimants, who may have no right to recover against New-NGC under applicable state law, nevertheless are entitled automatically to a Code remedy against New-NGC. Thus, all of these sources lead to the conclusion that, although the bankruptcy court determined that it did not have the power permanently to enjoin Unknown Claimants from seeking recovery from New-NGC on exhaustion of the Trust, the court did not impose any certain liability on New-NGC.

C.

In the alternative, the Trust asserts that the structure of Old-NGC's reorganization Plan makes New-NGC the *de facto* reorganized debtor. Relying on *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1274, 1278 (5th Cir. 1994), the Trust notes that, under bankruptcy law, the

reorganized debtor remains liable for any debt that is not discharged under the plan. Thus, the Trust explains that, in effect, the rights and obligations of Old-NGC were transferred to New-NGC, and, because the Unknown Claims were not discharged by the Plan, New-NGC will be liable for them on exhaustion of the Trust.

As support, the Trust points to the following evidence: (1) New-NGC was capitalized with approximately $350 million of assets of Old-NGC; (2) to receive favorable tax treatment, New-NGC was required to carry on the business of Old-NGC; (3) New-NGC retained Old-NGC's attorney-client privilege, even as against Old-NGC and ACMC; (4) Old-NGC's management had authority under the Plan to elect two of the directors of New-NGC, and the remaining directors were elected by the commercial creditors; (5) New-NGC retained the corporate name "National Gypsum Company"; (6) New-NGC's stock was not sold to unrelated third parties in an arms-length transaction, but instead was distributed to Old-NGC's commercial creditors, and the same person executed the APA for both the buyer and seller; and (7) the bankruptcy court stated that New-NGC would carry on and preserve the business of the debtor and that only those assets given to the Trust would be liquidated.

While all this evidence is consistent with the Trust's theory that New-NGC is the reorganized debtor following bankruptcy, New-NGC points to its own evidence that Old-NGC, not New-NGC, emerged from the bankruptcy proceeding as "Reorganized NGC" under the Plan. First, New-NGC cites the plain language of the bankruptcy documents. It notes that the Plan defined "Reorganized NGC" as "NGC, on and after the Effec-

tive Date, which entity shall be . . . the successor to NGC for all purposes." Thus, in a prior appeal, we recognized that the Trust "became the sole shareholder of the reorganized National Gypsum (which, in turn, became known as 'Asbestos Claims Management Corporation (ACMC)'." *Insurance Co. of N. Am. v. NGC Settlement Trust (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1059 (5th Cir. 1997). In contrast, "New NGC" means "a Delaware corporation to be formed pursuant to this Plan, and which shall do business from and after the Effective Date as '*National Gypsum Company.*'"

Similarly, the Trust Agreement provides that "the purpose of the Trust is to assume any and all liabilities *of the Debtors*" (emphasis added), and the Channeling Order provides for an injunction of actions against, among others, "the Debtors, New NGC, [or] Reorganized NGC," suggesting that New-NGC and the reorganized debtor are not the same entity under the Plan. Thus, treating New-NGC as the reorganized debtor is contrary to the plain language of the documents.

New-NGC also points out that the Trust's reliance on *Lemelle* is misplaced and that that decision actually supports New-NGC's contention that Old-NGC/ACMC remains the reorganized debtor. In *Lemelle*, the debtor corporation, Winston, sold its operating assets, during bankruptcy, in two separate transactions, leaving it with miscellaneous non-operating assets. *See Lemelle*, 18 F.3d at 1270. Following the discharge, Winston (through its successor) was sued for an act it had committed before the bankruptcy. It defended, arguing that it had not succeeded to any pre-bankruptcy liability, because it had not retained the operating assets of the debtor, and therefore it was liquidated. We rejected that

argument, concluding that Winston had not been liquidated and that the liability was not one that had been discharged in the Winston bankruptcy. *See id.* at 1273.

In rejecting Winston's argument that it had been liquidated, we refused to apply the "de facto liquidation" theory expressed in *Erie Lackawanna Ry. v. Henning,* 803 F.2d 881 (6th Cir. 1986). Instead, we concluded that the Sixth Circuit's theory—which provided, in the "admittedly unique" situation of a railroad debtor, that although the debtor "had gone through reorganization in form, in substance it had been liquidated"—lacked applicability outside the Rail Act context. *See Lemelle*, 18 F.3d at 1273 n.3. The lack of a formal liquidation in *Lemelle*, then, was dispositive of Winston's claim that a liquidation had occurred. *See id.* at 1273.

Thus, far from supporting the Trust's position, *Lemelle* is an example of the original debtor's remaining liable for non-Code claims, even where the operating assets were sold to another party. Indeed, the sale of the operating assets in *Lemelle* did not even contain the same restrictive language found in New-NGC's sale agreement with the commercial creditors.[11] Conse-

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[11] In *Lemelle*, we ultimately rejected the argument that the party that had purchased Winston's operating assets was liable for the pre-bankruptcy claims, because the terms of the purchase agreement were not properly submitted by Winston in response to summary judgment. *See Lemelle,* 18 F.3d at 1274. Nevertheless, the purchase language that did appear in the order was not as restrictive as that in the APA, *see id.*, and the underlying point remains true: The Trust's theory that non-Code claims were assumed automatically by the purchaser of the debtor's operating assets is at least as doubtful in this case as it was in *Lemelle.*

quently, *Lemelle* teaches that, because the Trust cannot establish that Old-NGC was formally liquidated, therefore Old-NGC remains the reorganized debtor following bankruptcy.

As we have pointed out, the APA provided for a limited assumption of liabilities and expressly disavowed assumption of any current or future asbestos claims. Moreover, Old-NGC was no "empty shell" following bankruptcy: It retained hundreds of millions of dollars of assets, including the stock of the Austin Company, and it is still paying asbestos claims and suing insurance companies. Nothing about these circumstances suggests that the Trust and ACMC did not continue as Old-NGC's reorganized debtor.

The Trust makes much of the fact that the sale of Gold Bond was to Old-NGC's commercial creditors; it argues that because the sale was not an "arms-length" transaction, we should not allow these creditors to escape the conclusion that New-NGC is just a reorganized form of the old debtor. New-NGC cannot be a new corporation free from Old-NGC's non-discharged debts, the Trust argues, because the commercial creditors paid no new consideration for the operating assets. Thus, by concluding that New-NGC is liable only under a state-law successor theory, we are shielding New-NGC's new owners—who were Old-NGC's old commercial creditors--from non-dischargeable liabilities. The Trust warns that we are sanctioning a "ruse" and inviting fu-

ture debtors to advocate bankruptcy plans that incorporate this strategy.[12]

Much of this rhetoric is dependent on the underlying argument that New-NGC, and not Old-NGC, is the reorganized debtor. But the Trust offers no principled reason why the fact that Gold Bond was purchased by Old-NGC's commercial creditors should outweigh all the textual evidence that Old-NGC/ACMC is the reorganized debtor under the Plan. It seems that the Trust's primary concerns seem to be with bankruptcy policy and the implications for future reorganization plans.

There is, however, good reason why we would want to encourage these types of reorganizations and to enforce the express terms of the deal to which the parties have agreed. All sides were adequately represented during bankruptcy proceedings, and legal representatives were appointed for current and future asbestos claimants and for commercial creditors and the company.[13] Nego-

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[12] In this way, the Trust seemingly hopes to equate this with earlier warnings in other asbestos litigation. For example, in *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 994 (5th Cir. 1996) (Smith, J., dissenting), *vacated*, 521 U.S. 1114 (1997), appeared the warning that "the majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead other financially threatened companies throughout the nation to utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." (Internal quotations and punctuation omitted.)

[13] This is in stark contrast to the facts of *Flanagan*, in which it was noted that, by removing the settlement from the bankruptcy context, Fibreboard denied the class of asbestos claim-

[Footnote continued on next page]

tiations were extensive, and the legal representative of the Unknown Claimants successfully blocked court approval of the Draft Plan, which permanently would have enjoined even state-law successor claims against New-NGC. Still, despite this setback, the commercial creditors were willing to give more in value to Old-NGC for Gold Bond than were any other purchasers, and we should be hesitant to change the terms of the deal after the fact just because subsequent developments in the *Georgine* settlement have resulted in the Unknown Claims' being underfunded in the Trust.

This is not a case in which Old-NGC has won approval of a plan to bail out its share holders, "forcing asbestos victims to surrender their claims in exchange for a meager" portion of the company's assets. *See Flanagan*, 90 F.3d at 993 (5th Cir. 1996) (Smith, J., dissenting). Instead, Old-NGC's chapter 11 bankruptcy was motivated at least as much by the $1.1 billion owed to bond and trade creditors as by the $800 or $900 million estimated liability for current and future asbestos disease claims. The bankruptcy court adopted a Plan whereby all the current and future asbestos claims were expected to be paid in full by the Trust, while the bond and trade creditors received only $350 million in assets in exchange for their $1.1 billion in claims.[14] This $750

[Footnote continued from previous page]
ants the right to vote on the proposed settlement. *See id.* at 996 (Smith, J., dissenting).

14 Thus, because the bankruptcy court did not foresee that the CCR would be disapproved and the Trust would be insufficient to fund both current and future asbestos claims, it is not, as the dissent suggests, "incredible to believe that the bankruptcy

[Footnote continued on next page]

million reduction in debt was sufficient "consideration," notwithstanding the Trust's arguments to the contrary.

Although the CCR ultimately was disapproved, there is no reason to believe that Unknown Claimants are now getting a worse deal under the Alternate Facility than commercial creditors originally received under the Plan; there are, after all, hundreds of millions of dollars in Insurance, Austin, and other assets in the Trust. Consequently, none of the Trust's concerns about the implications of shielding the bond and trade creditors from more liability is especially compelling, and those concerns certainly are insufficient to overcome the plain language of the Plan documents.

IV.

[Footnote continued from previous page]
court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation." Rather, the bankruptcy court simply entered a compromise agreement whereby the largest group of creditors, the commercial creditors, would receive something of value in return for their $1.1 billion in debt, while the asbestos claimants would receive everything else.

Then, when subsequently it became apparent that the Trust would be insufficient to fund Unknown Claims, the bankruptcy court unreasonably altered the meaning of the Plan documents to hold that future asbestos claimants could go after New-NGC. While this impulse may have been noble, and perhaps even socially desirable, the bankruptcy court cannot now ignore the plain meaning of the documents that created New-NGC as a separate operating company with no liability as a reorganized debtor.

In the end, then, both of the Trust's arguments fail. First, notwithstanding the bankruptcy and district courts' findings to the contrary, there is nothing "implicit" in the Plan documents or other bankruptcy court orders that provides that New-NGC will automatically succeed to Old-NGC's liability for Unknown Claims. Instead, the express terms of the Plan compel the opposite conclusion—i.e., that New-NGC will be liable only under non-bankruptcy, state-law successor liability. We see no reason to ignore the plain meaning of these Plan documents.

Second, Old-NGC and New-NGC are not the same entity. Under the Plan, Old-NGC became ACMC, a subsidiary of the NGC Settlement Trust. New-NGC was formed as a new corporation created to purchase the assets of Gold Bond for Old-NGC's commercial creditors. Pursuant to the Asset Purchase Agreement, New-NGC did not assume liability for asbestos claims, whether known or unknown. In exchange, its shareholders surrendered approximately $750 million in net claims it held against Old-NGC, and it took $350 million in assets "free and clear" of all liens. Thus, because there are no other provisions in the Plan that allocated the liabilities for asbestos claims from Old-NGC to New-NGC, New-NGC cannot be considered to have assumed those debts, and it is not the reorganized debtor.

By contrast, the Trust documents expressly contemplate that the Trust and its subsidiary, Old-NGC/ACMC, assume liability for all asbestos claims. The Plan also expressly provides that Old-NGC/ACMC is "Reorganized NGC." The Trust has not presented any compelling evidence why we should ignore the plain meaning of all these documents, nor has it presented a plausible argu-

ment that it is not the reorganized debtor following bankruptcy.

Accordingly, the judgment of the district court, affirming the order of the bankruptcy court, is REVERSED and REMANDED to the district court for further proceedings, as appropriate.

REAVLEY, Circuit Judge, dissenting:

The majority have chosen their own meaning of the 1993 order of the bankruptcy court by leaving future asbestos claimants to tort actions against Gypsum without recourse to the claims resolution facility of the bankruptcy order. I would follow the bankruptcy court's own construction of its order and avoid adding to the delay and lawyer fees for asbestos victims, a result that joins the ongoing judicial contribution to the asbestos debacle.[1] I dissent.

The 1993 order confirming the plan provided in section 9(b) that New-NGC "shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund," i.e., the fund administered by the Trust. Again, in the "channeling order" that is section 10(b) of the confirmation order, all persons holding an unknown asbestos claim are enjoined from suit against New-NGC "pending exhaustion of the remedies of the" Trust settlement fund. If the court was not directing that, if necessary,

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[1] For example, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

New-NGC assets followed Trust assets in the settlement facility, it was lifting its injunction and allowing an entirely new track for the claimants who waited for the second track to begin. While lawyers for the claimants could not count on better recoveries when the track changed, because New-NGC had the option of adding assets to the Trust Fund, the lawyer fees could be larger. This able bankruptcy judge would have recognized the vice of that scheme and would have avoided it.

When the financial creditors, who were to own New-NGC, objected to the court's channeling order for the reason that it "subordinates the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos liability," the court rejected this objection. Over the protest of Gypsum creditors who would own the New-NGC the bankruptcy court refused to protect it from future unknown claims but, as if the bankruptcy court had not decided the matter, this majority opinion holds that the bankruptcy court did not "transfer liability." But then the majority relents and restrains the transfer to the more limited "state-law successor liability."

Then there is the provision of the order at section 9(c) that expressly bars punitive damages by unknown claimants against New-NGC. The majority opinion dismisses this on the ground that the bankruptcy court had no authority to limit those damage awards because they were not "claims" within the meaning of the Bankruptcy Code. That is a curious response to the obvious point that the bankruptcy court is assuming the same liability of New-NGC in the channeling facility, rather than contemplating "state-law" litigation.

The bankruptcy court, in ruling in the pending adversary action, said: "With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated new NGC liability for claims not paid by the Trust and not otherwise discharged." The district court followed the law and gave deference to the bankruptcy court's interpretation of its own confirmation order. *See Farmhand, Inc. v. Anel Eng'g Indus., Inc.*[2] ("We see no basis for substituting our judgment for that of the district judge in interpreting his own order."). The bankruptcy judge will find demoralizing the majority conclusions that he "never intended" or "wanted to impose" a channeling liability after exhaustion of the Trust assets, or that the judge would reach this strange "state-law successor liability" and then forget that he had so ruled. Actually, it is incredible to believe that the bankruptcy court would create this new operating company with debtor assets, after holding that it had no authority to extinguish unknown asbestos claims of the debtor, and then leave it to state law governing successor liability to resolve the future asbestos liability of its mutant creation, without leaving so much as a footnote in the controlling documents suggesting such an intent. This appellate court should reject the incredible and stay with the judgment of the bankruptcy court.

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[2] 693 F.2d 1140, 1146 (5th Cir. 1982) (quoting *SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir. 1976)).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	
DEBTORS.	§	
NATIONAL GYPSUM COMPANY,	§	CIVIL ACTION NO. 3:98-CV-1032-P
APPELLANT,	§	
v.	§	
NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	
APPELLEES.	§	

MEMORANDUM OPINION AND ORDER
[Entered June 2, 1999]

Now before the Court is Appellant National Gypsum Company's ("Appellant" or "New NGC") appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division's ruling in the underlying adversary proceeding (the "Adversary Proceeding"). Appellant filed its initial brief May 13, 1998. Appellees NGC Settlement Trust and the Asbestos

Claims Management Corporation ("Appellees") filed their response on June 15, 1998, and Appellant filed its reply on July 2, 1998. Appellant seeks a reversal of the Bankruptcy Court's judgment in the Adversary Proceeding. Specifically, New NGC appeals the Bankruptcy Court's determinations that: 1) the chapter 11 plan of reorganization (the "Plan"), the documents implementing the Plan (the "Plan Documents") and the Order entered by the Bankruptcy Court in 1993 pursuant to 11 U.S.C. § 1129 confirming the Plan (the "Confirmation Order") "implicitly" imposed or maintained liability on New NGC for unknown asbestos disease claims ("Unknown Claims") to the extent the Trust is unable to resolve such claims, 2) it had jurisdiction to hear and Appellees had standing to bring the Adversary Proceeding, and 3) Jude Felsenthal need not recuse/disqualify himself from the action.

BACKGROUND

On October 28, 1990, National Gypsum company and its parent holding company, Aancor Holdings, Inc., each filed a petition for relief under chapter 11 of the Bankruptcy Code. The cases were subsequently consolidated by the bankruptcy court, and on March 9, 1993 the bankruptcy court entered an order confirming the plan of reorganization. ("Confirmation Order").

On September 4, 1992, the debtors submitted their first Amended and Restated Plan of Reorganization. ("The Plan"). The Plan provided for the division of National Gypsum's assets between two entities. Old National Gypsum ("Old NGC") was to keep insurance policies and the Austin Company, a subsidiary of National Gypsum. The Plan also provided for the creation of New National Gypsum ("New NGC") which acquired

the majority of operating assets and the ongoing business of National Gypsum. New NGC is a separate entity organized under the laws of Delaware. New NGC was to be owned by the bond and trade creditors of the debtor, National Gypsum. The management team of National Gypsum remained as the management team of New NGC. The Plan further created NGC Settlement Trust ("The Trust") to own the stock of Old NGC and to settle asbestos claims against National Gypsum. The Plan proposed that all asbestos claims, whether known or unknown, would be discharged and subject to a permanent injunction prohibiting future litigation against any person or entity. Thus, under the Plan, known and unknown asbestos claimants could only look to the Trust for their remedies. At a heading in January 1993, the bankruptcy court informed the parties that the provisions of the Plan purporting to discharge and enjoin unknown asbestos claims were not permissible under applicable bankruptcy law. The bankruptcy court determined that unknown asbestos claims were not "claims" within the meaning of Section 101(5) of the Bankruptcy Code and, hence, could not be discharged or subject to the permanent injunction as proposed by the Plan. Subsequent to this bench ruling by Judge Felsenthal, on March 5, 1993, the debtors submitted the "Third Technical Modifications of the First Amended and Restated Joint Plan of Reorganization of National Gypsum Co., Inc. and Aancor Holdings, Inc." ("The Third Modifications"). On or about March 8, 1993, objections to the Third Modifications were filed by the bond and trade creditors committee. The bankruptcy court overruled the objections and entered the Confirmation Order and Findings and Conclusions on March 9, 1993. Appeals were filed with re-

spect to entry of the Confirmation Order but were subsequently dismissed.

On September 8, 1997, the Trust filed a motion seeking a ruling from the bankruptcy court as to New NGC's liability for unknown asbestos claims in the event the Trust was unable to satisfy those claims. On February 4, 1998, the bankruptcy court determined that the relief sought by the Trust could only be sought by adversary proceeding. The Trust filed an adversary proceeding on February 5, 1998, and the case was tried on February 25, 1998. On February 27, 1998, Judge Felsenthal issued a bench ruling finding that New NGC was liable to unknown asbestos claimants under the terms of the Plan and Confirmation Order. On March 25, 1998, judgment was entered based on the prior bench ruling. New NGC timely appealed.

As a preliminary matter, the court needs to reconsider the Trust's motion to supplement the record filed on June 15, 1998. By order of July 13, 1998, this court denied the Trust's motion to supplement the record. As part of its motion to supplement the record, the Trust seeks to make the objections of the bond and trade creditors committee to the Third Modifications part of the appellate record in the appeal now before the court. Those objections were filed on March 8, 1993, prior to entry of the Confirmation Order, and were part of the record before the bankruptcy court when it entered its Confirmation Order. As such, the objections are properly part of the appellate record in the present appeal be-

fore this court.[1] Thus, appellee's motion to supplement the record is Granted with respect to the objections by the bond and trade creditors committee to the Third Modifications and is Denied with respect to the remaining documents.

DISCUSSION

I. STANDARD OF REVIEW

When a district court reviews a bankruptcy court's decision, it functions as an appellate court and utilizes the same standard of review generally applied by a federal court of appeals. *In re Webb*, 954 F.2d 1102, 1104 (5th Cir. 1992). In reviewing conclusions of law on appeal, a *de novo* standard of review is applied. *In re Coutee*, 984 F.2d 138, 140 (5th Cir. 1993); *In re Young*, 995 F.2d 547, 548 (5th Cir. 1993); *In re Allison*, 960 F.2d 481, 483 (5th Cir. 1992). A bankruptcy court's findings of fact are subject to the clearly erroneous standard of review. *Young*, 995 F.2d at 548; *Allison*, 960 F.2d at 483. These findings are reversed only if, based on the entire evidence, the court is left "with the definite and firm conviction that a mistake has been made." *Id.*

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[1] In the order of July 13, 1998, this court noted that "there is no indication that the Bankruptcy Court considered or even reviewed the proposed documents when reaching its judgment in the underlying adversary proceeding." While that statement is true with respect to the documents pertaining to the appeal of the Confirmation Order, it is not true with respect to the objections to the Third Modifications.

II. JURISDICTION

Appellant maintains that the bankruptcy court had no jurisdiction to hear the declaratory action brought by the Trust because the declaratory action sought to establish successor liability against New NGC, a non-debtor, with respect to post-confirmation personal injury and wrongful death tort claims of other non-debtors, unknown asbestos claimants. Appellant further argues that since the Plan has been confirmed and substantially consummated, the mere fact that New NGC, a non-debtor, is now alleged to have successor liability for the former debtor's torts does not give rise to "related to" jurisdiction. Appellant also challenges the standing of the plaintiffs to bring the declaratory judgment action and asserts that the plaintiffs are not the real party in interest. Appellant argues that the potential unknown asbestos claimants who are not satisfied from the assets of the Trust are the real parties in interest and the parties who have standing to bring this suit.

Judge Felsenthal found that this declaratory judgment action was not a suit to determine the successor liability of New NGC under the laws of thee several states and did not require the court to determine any individual tort claim. (R.A. Tab 30, at 194). Instead, the bankruptcy court found that "this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New NGC." *Id.* On that basis, Judge Felsenthal held that the suit involved the construction of a Chapter 11 plan of reorganization confirmed by an order of the bankruptcy court and was a core matter over which he had jurisdiction.

A bankruptcy court has jurisdiction to declare and determine the scope and effect of an order entered in prior bankruptcy proceedings, and the ability to rule on the legality of plan provisions, releases and injunctions which may be part of the plan. *In re Fairchild Aircraft Corp. v. Campbell*, 184 B.R. 910, 915 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, No. 94-5113, 1998 WL 244272 (Bankr. W.D. Tex. May 13, 1998). As discussed in more detail *infra*, this court agrees that the declaratory judgment action was not a proceeding to establish successor liability of New NGC on the basis of successor liability law. Rather, the declaratory judgment action brought by the Trust sought an interpretation of the confirmation order entered by the bankruptcy court in 1993. Additionally, jurisdiction of the bankruptcy court is provided for in 28 U.S.C. § 1334. The Fifth Circuit has held in determining whether jurisdiction exists, "it is necessary only to determine whether a matter is at least 'related to' the bankruptcy." *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 568-69 (5th Cir. 1995) (internal citations omitted). The *Walker* court further stated that "an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate. *Id.* at 569. Under this test, this suit is "related to" the bankruptcy. The outcome of this suit will impact the way the Trust handles and administers the bankruptcy estate and could alter the Trust rights, liabilities, options or freedom of action in resolving asbestos related claims against the estate. Thus, the court finds that the bankruptcy court had jurisdiction to hear the declaratory judgment action filed by the Trust.

The court also finds that the plaintiffs have standing to bring this suit and are real parties in interest. The Fifth Circuit holds that the "irreducible minimum of standing contains three elements." *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 915 (5th Cir. 1997). The three elements, which the party asserting standing bears the burden of establishing, are: (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some independent action of some third party not before the court; and (3) it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Id.* at 915-16 (internal citations and quotations omitted).

Under the provisions of the Confirmation Order, known asbestos claims were limited to recovering solely from the Trust and could not seek recovery from Old NGC or New NGC. Under the Third Modification and Confirmation Order, unknown asbestos claimants were initially channeled to the Trust for their remedies. The Order further provided that New NGC would not be subject to the commencement or continuation of litigation by unknown asbestos claims pending exhaustion of the remedies provided by the Trust. (Confirmation Order, para. 9(b)). Due to events transpiring after the Confirmation Order was entered, the Trust recognized that it would not have sufficient assets to satisfy the known and unknown asbestos claims it anticipated would be filed. In order for the Trust to determine how to allocate its limited resources, the Trust filed the present suit to ob-

tain a declaration from the bankruptcy court as to whether the confirmation order barred unknown asbestos claimants from seeking relief against New NGC. Resolution of the issues presented in the declaratory action will provided guidance to the Trust on how to allocate its bankruptcy estate assets among the known and unknown asbestos claimants. While the ultimate beneficiaries of the bankruptcy court's ruling will be asbestos claimants, the Trust has the ongoing responsibility under the confirmation order to administer the bankruptcy estate in attempting to satisfy these claimants. In particular, the Trust's decisions on how to allocate its assets will be impacted by whether unknown asbestos claimants have recourse to new NGC or will be limited to seeking recovery from the Trust. Hence, plaintiffs satisfy the elements of standing and are the real parties in interest in this suit.

III. THE BANKRUPTCY COURT'S DETERMINATION ON LIABILITY

On February 27, 1998, the Bankruptcy Court issued its 1998 Bench Ruling and entered its Judgment on March 25, 1998. The Judgment held that "[p]ursuant to the plan, as modified, and the Confirmation Order, New NGC is liable for an unknown asbestos disease claim, as that term is defined . . ., to the extent that such unknown asbestos disease claim has not been discharged by the [P]lan and [C]onfirmation [O]rder and is not satisfied or otherwise resolved by the Trust and ACMC." (Judgment, at 2). In reaching this result, the Bankruptcy Court stated:

> Unknown asbestos disease claimants could not be discharged. They were channeled to the trust. They were enjoined from commencing

> litigation against New NGC pending exhaustion. Having exhausted their Trust remedies, the unknown asbestos disease claimants could have the injunction lifted and commenced litigation against New NGC, with their claims not discharged. Pursuant to the plan and by definition of the plan, the Trust remedies will have been exhausted pursuant to two enumerated criteria. The trust owns Old NGC. Its assets for all practical purposes would have been exhausted. If the unknown claimants could not proceed against New NGC with New NGC having liability, the unknown claimant would have no meaningful remedy. With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated New NGC liability for claims not paid by the Trust and not otherwise discharged.

(Appendix to Appellant's Brief, Tab 30, at 200-01, 1998 Bench Ruling). Further, the Bankruptcy Court explained that the Confirmation Order implicitly provided for Appellant's continued liability and that this liability was implicit in the contractual arrangement. *Id.* at 206, 210.

In its appeal, New NGC asserts that the Bankruptcy Court should be reversed for a host of reasons. Of these reasons, however, the most compelling is Appellant's claim that the Bankruptcy Court's interpretation of the Plan, Plan Documents and Confirmation Order was in error because it contradicts the plain language of these Documents. (Appellant's Brief, at 26). Specifically,

New NGC argues that none of these documents "contains any language that purports to impose liability upon New NGC to Unknown Claimants injured by Old NGC's torts and products." *Id.* at 27. Rather, Appellant claims that the language in these documents expressly denies that New NGC would retain liability for Unknown Claims. *See id.* at 27-9. Given the express language found in the Plan, the Plan documents and the Confirmation Order, Appellants conclude that the Bankruptcy Court's interpretation of implicit liability is unsupported by law.

Not surprisingly, Appellees dispute New NGC's conclusion, and maintain that the Bankruptcy Court's interpretation of its Confirmation Order presents the only reasonable and legally appropriate interpretation of the Plan, the Plan Documents and the Confirmation Order. (Brief of Appellees, at 18). In so arguing, Appellees reference the Bankruptcy Court's 1998 Bench Ruling in which the Bankruptcy Court explains that it must read the plan and its implementing document, "coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs." (Brief of Appellee, at 19) (citing 1998 Bench Ruling, at 195-95). Consequently, Appellees argue that the judgment in the Adversary Proceeding is simply the result of the Bankruptcy Court interpreting its Confirmation Order in a manner consistent with the Plan, the plan documents, and the bankruptcy court's application of bankruptcy law. Appellees further contend that the finding that New NGC maintained its liability for Unknown Claims was necessary to give effect to the Bankruptcy Court's earlier refusal to approve a plan that would discharge or permanently enjoin unknown asbestos disease

claimants. (Brief of Appellee, at 19). Similarly, Appellees argue that the Bankruptcy Court's implementation of the Channeling Injunction presumes continued liability of New NGC for Unknown Claims. *Id.* at 20. In addition, Appellees claim that "[t]he 1993 Bench Ruling is replete with evidence of the Court's determination that New NGC—a creature of the reorganization—would always remain liable for the Unknown AD claims." *Id.* Therefore, in light of its previous determinations and statements in its 1993 Bench Ruling, Appellees conclude that the Bankruptcy Court's judgment is a proper interpretation of the Plan, Plan Documents and Confirmation Order.

Initially, the Court notes that the issues raised in the Adversary Proceeding required the Bankruptcy Court to interpret the Confirmation Order it issued in 1993. In general, when an appellate court reviews a lower court's interpretation of its own order, that interpretation is afforded great deference. *Harrison v. Metropolitan Gov't of Nashville & Davidson County*, 80 F.3d 1107, 1119 (6th Cir. 1996); *see also Schwinn Cycling & Fitness Inc. v. Benonis*, 217 B.R. 790, 795 (Bank. N.D. Ill. 1997) ("the court's reading of its own order . . . is entitled to respect.") (*quoting Matter of Xonics, Inc.*, 813 F.2d 127, 130 (7th Cir. 1987)).

In interpreting a plan of reorganization, a court applies the rules of contract interpretation. *Matter of Texas Green Petroleum Corp.*, 52 F.3d 1330, 1335 (5th Cir. 1995). "A question of contract interpretation, including the determination of whether a contract is ambiguous in order to permit extrinsic evidence of intent, is a question of law." *In re Stratford of Texas, Inc.*, 635 F.2d at 368. Generally, a court should determine a con-

tract's meaning without considering extrinsic evidence in accordance with the principle that the language of the agreement, unless ambiguous, represents the parties' intentions. *Id.* (*citing Eaton v. Courtauds of North America, Inc.*, 578 F.2d 87, 90 (5th Cir. 1978). However, if ambiguity exists, the court may accept extrinsic or parole evidence to establish the parties' true intentions; however, determining the parties' intent from extrinsic evidence is a question of fact. *In re Stratford of Texas, Inc.*, 635 F.2d at 368.

In its brief, Appellant argues that the Plan, Plan Documents and Confirmation Order unambiguously indicate that it was not the intent of the parties to impose any liability upon NNG for any Asbestos Claims. (Appellant's Brief, at 27). Specifically, Appellants claim that the Asset Purchase Agreement, the Plan, and the Confirmation Order unambiguously indicate that no imposition of liability was intended. *Id.* at 27-8. Appellees agree that the Confirmation Order and its implementing documentation are unambiguous, but urge a different construction of the documents.

With respect to the Asset Purchase Agreement, Appellant claims that successor liability is specifically rejected in sections 1.1, 2.1(b) and 2.4. Section 1.1 states that "Seller shall convey to Buyer the Acquired Assets . . . free and clear of all Liens, Claims, Interests, and other liabilities, duties, obligations . . . ." (Appendix to Appellant's Brief, Asset Purchase Agreement, at 3). Section 2.1(b) explains that the Buyer agrees to assume all liabilities arising on or before the closing date or related to the business of the Seller conducted on or before the closing date including "al obligations to fund the Asbestos Fund Expenses Commitment." *Id.* at 7. Sec-

tion 2.4 states that notwithstanding those expressed in section 2.1, "Buyer does not hereby assume, and shall not be deemed to have assumed, any liabilities of Seller of any kind or nature, known, unknown, contingent, or otherwise, by reason of any theory of law or equity." *Id.* at 13. With respect to the Plan, Appellant points to section 5.2(d) which states that "the obligations regarding the Asbestos Claims . . . shall be the sole responsibility of the [Trust]." Appellant argues that "[i]f the obligation for Asbestos Claims under the Plan belonged to New NGC as well as the Trust, the Agreement would not have excluded the assumption of such liabilities and the Plan would not have provided that they were solely the Trust's responsibility." (Appellant's Brief, at 27). In addition, Appellant argues that the Confirmation Order provided that the sale of assets to New NGC was "free and clear of all Liens, Claims, Interests and other liabilities . . . to the maximum extend [sic] permitted by the Bankruptcy Code . . . ." (Appellant's Brief, at 28) (citing Confirmation Order, at § 6(a)). Given the language of these documents, Appellant concludes that the agreement unambiguously rejects any imposition of liability on New NGC for asbestos claims. The Court does not agree.

First, the Bankruptcy Court explicitly stated in its Confirmation Order that "New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease claims pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund." (Confirmation Order, at ¶ 9) (emphasis added). The clear implication of this statement is that once the Settlement Fund is exhausted, Unknown Claimants may

commence litigation against NNG. Appellants would read this statement as standing for the proposition that once the fund is exhausted an Unknown Claimant can sue, but will have to overcome an additional hurdle of proving successor liability under the applicable state law. The Court can find nothing in the Plan, Plan Documents or Consolidation Order (the "Agreement Documents") which contemplates this reading. Further, the Confirmation Order barred punitive damages by unknown asbestos claimants against New NGC. (Confirmation Order, at ¶ 9(c)). This indicates that the Order contemplated that New NGC would be liable for other types of damages.

With respect to the Assets Purchase Agreement, Article 2.2(iii) provides that new NGC is to assume any obligations and liabilities pursuant to any Final Order of the Bankruptcy Court. The bankruptcy court interpreted its Confirmation Order as leaving New NGC liable for unknown asbestos claims to the same extent that Old NGC was liable. When viewed in isolation, certain provisions of the Confirmation Order, the Plan and the Assets Purchase Agreement arguably support the appellant's arguments that New NGC emerged from the bankruptcy proceedings without any liability for unknown asbestos claims. However, as the bankruptcy court explained, "the plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. The plan and its implementing documents cannot be read to render any provision of the

confirmation order meaningless or superfluous."[2] (1998 Bench Ruling, at 194-95). When considered in light of the bankruptcy court's findings in January 1993, the intent of Confirmation Order is clear. In response to the proposed joint plan of reorganization, the bankruptcy court determined in January 1993, that as a matter of bankruptcy law, the unknown asbestos claims could not be discharged or enjoined. However, to offer some protection from potential litigation involving unknown asbestos claims to New NGC as an ongoing business emerging from bankruptcy proceedings, the bankruptcy court entered the channeling order. The Confirmation Order expressly provided that the unknown asbestos claims would be channeled to the Trust as long as the Trust had sufficient assets to satisfy those claims. It is, as Judge Felsenthal found, implicit in the Confirmation Order that if the Trust had insufficient assets to satisfy the unknown claims, those claimants could look to New NGC. Thus, the issue was not, and is not, one of successor liability as appellant insists. Rather, the issue is one of application of bankruptcy law and of interpretation of the Confirmation Order. The application of bankruptcy law occurred in 1993 when Judge Felsenthal

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[2] It also appears likely that since the plan of reorganization initially provided that New NGC would not be liable for unknown asbestos claims, the Assets Purchase Agreement and the Plan contained provisions that gave effect to this intent. After the Third Modifications were presented and ruled on, it appears that some of the language in the implementing documents purporting to absolve New NGC from liability for unknown asbestos claims was not removed. In any event, when considering the Confirmation Order in light of the implementing documents and the surrounding circumstances, the court finds the Confirmation Order is unambiguous.

determined that unknown asbestos claims against New NGC were not "claims" within the meaning of the Bankruptcy Code and thus could not be discharged or enjoined. That determination was not appealed and is now a binding, final order. The issue before the bankruptcy court in the case now before the court was the interpretation of the Confirmation Order, specifically, whether New NGC retained liability for unknown asbestos claims under the terms of the Confirmation Order. In the present suit, the bankruptcy court found that it determined in 1993 that unknown asbestos claims against New NGC could not be discharged and could not be enjoined, and that New NGC was liable for those claims to the same extent as Old NGC, the debtor. Thus, the Confirmation Order implicitly established that New NGC was liable to unknown asbestos claimants as a matter of bankruptcy law. As noted above, that determination by the bankruptcy court was not appealed. As the bankruptcy court found, if New NGC was not to have any liability for unknown asbestos claims, the channeling order would have been unnecessary. Further, if upon the lifting of the channeling order, the unknown asbestos claimants had no recourse to New NGC, those claims would, in effect, have been discharged by the Confirmation Order. Judge Felsenthal also explained that the transfer of assets from the debtors to New NGC was not an "isolated transfer" nor a third party transaction. New NGC was created by the Plan and acquired its assets pursuant to the Plan. New NGC, therefore, does not stand in the shoes of third party purchaser who acquired the assets in an arms length transaction. Thus, the issue before the bankruptcy court was not the issue of successor liability but of interpretation of the Confirmation Order.

Appellant insists that the bankruptcy court's order now before this court amounts to an adjudication of the unknown claimants' tort claims against New NGC and thus exceeded the jurisdictional limitations of the bankruptcy court. As noted above, this argument misconstrues the issue before the bankruptcy court. The issue was the whether New NGC retained liability to unknown asbestos claimants under the terms of the Confirmation Order. In its bench ruling in 1998, the bankruptcy court specifically noted that the suit before it did not call upon the court to determine any individual tort claim. The arguments now made by appellant with respect to the impropriety of the bankruptcy court's determination that New NGC could not be discharged from liability to unknown asbestos claimants should have been made in 1993.[3] The court finds that the bankruptcy court correctly interpreted its Confirmation Order, and the judgment of the bankruptcy court is affirmed.

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[3] In this connection, the court notes that in their objections to the Third Modifications, the bond and trade creditors committee noted that "[u]nder the Third Modification, contrary to the NGC Plan as solicited, asbestos creditors may be able to pursue the assets of New NGC in the future." The bankruptcy court overruled the objections, and the subsequently entered Confirmation Order was not appealed. In light of these objections to the Third Modifications, appellant's arguments that the bankruptcy court's interpretation of the Confirmation Order denied creditors full and fair disclosure of New NGC's continued liability for unknown asbestos claims and that creditors and third parties expected that New NGC would not be liable for those claims are without merit.

IV. RULING ON THE MOTION TO RECUSE/DISQUALIFY

The Confirmation Order required the Trust to submit, under seal, semi-annual reports to the bankruptcy court containing information pertaining to the number of claims filed and resolved, the assets remaining in the Trust, the status of the participation of Old NGC and the Trust in the Center for Claims Resolution, and "such information as the Court may, from time to time, require." (R.A. Tab 36, at para. 9(e)). In the course of filing these reports, the Trust informed the bankruptcy court that New NGC's liability to unknown asbestos claimants would need to be resolved. The report further stated that if unknown claimants have only the Trust as their remedy, New NGC would, in effect, have the permanent injunction that New NGC "did not get at confirmation. . ." Appellant urges that 28 U.S.C. § 455(a) and Bankruptcy Rule 5004(a) required Judge Felsenthal to recuse himself after receiving these inappropriate and prejudicial ex parte communications from the Trust. By order of December 4, 1997, Judge Felsenthal denied appellant's motion for recusal. Assuming, as did the bankruptcy court, that the Trust's reports constituted improper ex parte communications, the court finds that the bankruptcy court did not commit error in denying the motion for recusal.

The decision to recuse is committed to the discretion of the trial court and is reviewed for abuse of discretion. *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997). The purpose of section 455(a) is to protect against even the appearance of impropriety. The standard used to determine if recusal is appropriate is "whether a reasonable an objective person, knowing all

of the facts, would harbor doubts concerning the judge's impartiality." *Id.* In light of the extensive and ongoing litigation which has resulted from this bankruptcy filing and the myriad of issues which were before the bankruptcy court, the court finds that a reasonable and objective person, knowing all of the facts, would not have doubts concerning the judge's impartiality. The information of which appellants complain was not secret information which appellants did not have the opportunity to address. Indeed, the information placed in the reports by the Trust ultimately became the Trust's position in its declaratory judgment action, was squarely before the judge in deciding the case, and was responded to by appellants. Further, there is no evidence that the ex parte communications influenced the judge, or that the judge relied on the information in deciding the case before him. *Trust Company of Louisiana v. N.N.P., Inc.*, 104 F.3d 1478, 1491 (5th Cir. 1997). The judgment of the bankruptcy court on the motion to disqualify is affirmed.

So Ordered.

Signed this 28th day of May 1999.

/s/

Jorge A. Solis
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
NATIONAL GYPSUM COMPANY, AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37213-SAF-11
	§	CASE NO. 390-37214-SAF-11
DEBTORS.	§	(Jointly Administered)
NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	§	
PLAINTIFFS,	§	ADVERSARY NO. 398-3309
VS.	§	
NATIONAL GYPSUM COMPANY,	§	
DEFENDANT.	§	

JUDGMENT

[Entered March 25, 1998]

This adversary proceeding came on for trial on February 25, 1998, on the complaint of the NGC Settlement Trust and the Asbestos Claims Management Corporation for declaratory judgment that the first amended and restated joint plan of reorganization of National Gypsum Company and Aancor Holdings, Inc., as amended, the

order of this court confirming the plan and plan implementing documents, including but not limited to the assets purchase agreement, impose liability on the defendant for unknown asbestos disease claims. The court having considered the evidence admitted at the hearing, the arguments of counsel, and the record of this proceeding and the confirmation hearing in the underlying bankruptcy case, and the court having rendered a decision on the construction of the plan, confirmation order and plan documents in the bench ruling announced February 27, 1998, which constitutes its findings of fact and conclusions of law;

IT IS THEREFORE ORDERED that pursuant to the plan as modified, and the confirmation order, New NGC is liable for an unknown asbestos disease claim as that term is defined in section 1.17 of the third technical modifications of the plan to the extent that such unknown asbestos disease claim has not been discharged by the plan and confirmation order and is not satisfied or otherwise resolved by the Trust and ACMC. This declaratory order does not alter, suspend or otherwise modify any provisions of the plan or confirmation order. This declaratory judgment does not relieve any individual unknown asbestos disease claimant of any element of his burden of proof in any individual tort litigation.

Signed this 23rd day of March, 1998.

/s/

Steven A. Felsenthal
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	BK. NO: 390-37213-SAF-11
NATIONAL GYPSUM COMPANY, a Delaware corporation,	)	
DEBTOR.	)	
IN RE:	)	BK. NO: 390-37214-SAF-11
AANCOR HOLDINGS, INC., a Delaware corporation,	)	
DEBTOR.	)	JOINTLY ADMINISTERED

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,	)	
Plaintiffs,	)	
vs.	)	ADV. NO.: 397-3319
CURRENT NGC ASBESTOS DISEASE CLAIMANTS, UNKNOWN NGC ASBESTOS DISEASE CLAIMANTS, DANIEL M. PHILLIPS, the Legal Representative of the Un-	)	

Representative of the Unknown Claimants, and	)
THE ASBESTOS DISEASE CLAIM TRUSTEES' ADVISORY COMMITTEE,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

[Bench Ruling of February 27, 1998]

* * *

The first is adversary proceeding 398-3309, which I refer to as the Trust declaratory judgment action regarding liability of New NGC. I'm doing this somewhat abbreviated, but the parties know what the issues are and I don't believe I need to spell out all of them. In this adversary proceeding, the NGC Settlement Trust seeks a declaration that, pursuant to the National Gypsum Company plan of reorganization as confirmed by order of this court pursuant to the United States Bankruptcy Code, New NGC is liable for non-Bankruptcy Code asbestos disease claims not resolved by the Trust. Again, this is shorthand. It's implicit that there is to otherwise be tort liability that would have been found against National Gypsum Company.

The Trust contends that the plan, as confirmed by the court, imposes liability on New NGC. New NGC contends that pursuant to the asset purchase agreement, New NGC did not expressly assume liability for unsatisfied non-Bankruptcy Code asbestos disease claims, but rather the plan provided that liability of New NGC, if

any, would be determined on a case-by-case basis upon the lifting of the channeling order.

The construction of a Chapter 11 plan of reorganization as confirmed by an order of the United States Bankruptcy Court is a core matter over which this court has jurisdiction to enter a final order with judgment. I believe Judge Solis summoned the motion to withdraw reference when this item came up as a contested matter has now entered a finding to that effect. In the order confirming the National Gypsum plan, this court specifically retained its jurisdiction. This declaratory judgment action is ripe for adjudication because of the impact of the liability determination to the motion of the Trust to terminate participation of ACMC in the Center, which is currently under advisement with this court and which I intend to address later this morning.

This declaratory judgment does not call upon this court to determine and apply a successor liability laws of any of the several states. Nor does this declaratory judgment action call upon the court to determine any individual tort claim. Rather, this declaratory judgment action calls upon the court to determine whether the plan this court confirmed pursuant to a final order of this court imposed or maintained liability for asbestos disease claims on New NGC.

Justice Scalia writing for a unanimous Supreme Court in *Timbers* litigation instructed that the reading of the Bankruptcy Code was a holistic endeavor. The Bankruptcy Code must be read as a whole giving meaning to all its terms and provisions, rendering none meaningless or superfluous, but rather assuring that the Code be coherent and consistent. That same rule of construction applies to a plan of reorganization confirmed by a

court pursuant to a court order and implemented through plan documents approved by the court, but subject to the confirmation order. The plan as implemented through the plan documents, must be read as a whole consistent with the confirmation order. The plan and its implementing documents must be read coherently, giving meaning to all its provisions and terms, but doing so consistent with the confirmation order, which governs. the plan and its implementing documents cannot be read to render any provision of the confirmation order meaningless or superfluous. In the event of a conflict between the plan documents and the plan, the plan governs. In the event of a conflict between the plan and the confirmation order, the order governs.

Applying these fundamental rules of contractual construction, the plan as confirmed by order of this court implicitly imposes or maintains liability on New NGC for asbestos disease non-Bankruptcy Code claims not discharged by the confirmation order and not satisfied by the Trust. That is the only reading that gives meaning to the court's order that the non-Bankruptcy Code asbestos disease claims could not be and were not discharged; that the claims could not be permanently enjoined from commencing tort litigation against New NGC and that the channeling order with a temporary injunction suits against New NGC could be lifted by order of this court upon the satisfaction of the enumerated criteria. If the plan did not impose or maintain liability on New NGC, then the court's decision that the subject claimants could not be permanently enjoined becomes a meaningless court order, as does the court's order that those claims could not be discharged.

At the time of the filing of the bankruptcy petition, National Gypsum Company no longer manufactured, distributed, applied or marketed asbestos containing products. Rather, New National Gypsum Company was an operating entity in the gypsum wallboard business, which also owns several other operations. Upon confirmation of the plan, New NGC was created by the plan to be the operating business entity of the gypsum wallboard business.

In this court's bench ruling on January 29, 1993, the court explained that asbestos disease claims sound in tort. For a claim under the Bankruptcy Code, the holder of a claim had to have a right to payment recognized under non-bankruptcy law. Thus, for a right to payment based on a tort, a person must have suffered an injury that would result in a damages judgment in the applicable jurisdiction. A breach of duty that did not cause or result in an injury compensable in damages would not create a right to payment. What constitutes an injury cognizable in damages varies by jurisdiction. The court went on to explain that persons exposed to asbestos from National Gypsum Company's asbestos-containing products who have suffered an injury recognized and compensable in the appropriate non-bankruptcy jurisdiction have a claim under the Bankruptcy Code, whether reduced to judgment, unliquidated or disputed. The court may impose a permanent injunction against those persons pursuant to Section 524 and 1141 of the Bankruptcy Code. Persons exposed to asbestos from National Gypsum Company's asbestos-containing products who have not suffered an injury recognized and compensable in the appropriate non-bankruptcy jurisdiction, do not have a claim under the Bankruptcy Code. As to them,

the court could no impose a permanent injunction under either Sections 524 or 1141.

The court's findings of facts and conclusions of law entered March 9, 1993 adopted the plan's definition to implement the bench rulings. Code claimants were defined as current asbestos disease claims. Non-Bankruptcy Code claimants were defined as unknown asbestos disease claims. Without restating the entire explanation of the court's reasoning as contained in the bench ruling, the court found under non-bankruptcy law that the plan could establish a trust for asbestos disease claimants, be they current or unknown. All could be the beneficiaries of the trust. Under the Bankruptcy Code, the current claimants would be discharged and the operating business entity would be shielded from liability by them by a permanent injunction. Under the Bankruptcy Code, the unknown asbestos disease claimants would not be discharged. If not satisfied by the Trust, the unknown claimants would have recourse to the operating business entity.

The court channeled the unknown asbestos disease claimants to the Trust. Channel means to route from one place to another. The unknown asbestos disease claimants were routed from the operating business entity to the Trust where they would remain unless or until the Trust could not satisfy their claims. Should that eventuality occur, the unknown asbestos disease claimant could move to lift the channeling order, thereby permitting them to proceed against the operating entity. That entire scenario only had meaning if the operating entity has liability, the operating entity as established by the plan in New NGC.

Focusing on asbestos claims. The court's findings of facts and conclusions of law at number 39 found that the plan and confirmation order provided an equitable means to compensate asbestos claimants with injunctions and a channeling order essential to the viability of the business operation of New NGC and to the successful implementation of the plan, including assuring asbestos-related litigation protection for New NGC to provide it with an enterprise value of $350 million on the effective date of the plan. The court had found that with such protection, New NGC would have a $350 million effective date value. That being the value of property used to satisfy over $1 billion in trade and bondholder debt. Paragraph 39 also found that following the court's bench ruling, which I just summarized, the debtor modified the plan to incorporate the definitions consistent with the court's bench findings and modified the injunction and channeling order to comply with the court's ruling. The court found and concluded that without the protections of the injunction and channeling order for New NGC, National Gypsum Company could not consummate its plan.

At paragraph 41, the court found that there were approximately 62,000 holder of asbestos disease claims recognized as claims under the Bankruptcy Code subject to a discharge and permanent injunction. The court found they would be paid by what is now referred to as the Trust. The court also estimated 150,000 to 165,000 unknown asbestos disease claims who could not be discharged, but who were channeled from the operating entity to the from the operating entity to the Trust, being made beneficiaries of the Trust. The court estimated that those claims had an indemnity value of between

$695 million and $765 million. The court found that asbestos claimants should be fairly and similarly treated under the plan, pursuant to the implementing orders of the court.

To implement the plan, the court identified at number 42 certain plan documents, which the court will discuss in a moment.

In its conclusions of law at paragraph 8, the court concluded it could discharge property damage and current asbestos disease claims and permanently enjoin suit by those claimants against New NGC and others. For unknown asbestos disease claimants, the court again concluded that it could not grant a discharge or issue a permanent injunction. The third motion to modify the plan deleted any permanent injunction or discharge for unknown asbestos disease claimants from the plan. The court again concluded it could channel those people to the Trust, making them beneficiaries. The channeling order protected the $350 million effective date value for New NGC necessary to place New NGC in the market with the value necessary to deliver plan benefits to the trade and bond creditors. With the channeling order, the court concluded it could enjoin unknown asbestos disease claimants from commencing litigation against New NGC pending exhaustion of their Trust remedy.

Let's take a pause at this point and reflect on these series of findings giving the language used its plain meaning. Unknown asbestos disease claimants could not be discharged. They were channeled to the Trust. They were enjoined from commencing litigation against New NGC pending exhaustion. Having exhausted their Trust remedies, the unknown asbestos disease claimants could have the injunction lifted and commence litigation

against New NGC, with their claims not discharged. Pursuant to the plan and by definition of the plan, the Trust remedies will have been exhausted pursuant to two enumerated criteria. The Trust owns Old NGC. Its assets for all practical purposes would have been exhausted, if the channeling order is to lift at least to the level necessary to satisfy a particular claim. If the unknown claimant could not proceed against a New NGC with New NGC having liability, the unknown claimant would have no meaningful remedy. With all due respect to the learned and considered arguments of counsel, the only reading that gives meaning to these findings of fact and conclusions of law are that this plan as confirmed by this court contemplated new NGC liability for claims not paid by the Trust and not otherwise discharged.

Paragraph 9 concludes that the plan and confirmation order are binding on New NGC and others. Paragraph 10 concludes that the court could retain jurisdiction as provided by the plan and confirmation order. Paragraph 12 incorporates the bench rulings.

Thereupon, the court entered its confirmation order on March 9, 1993. The court confirmed the plan with the three modifications approved by the court. That was paragraph number one. But the court specifically provided that in the event of a conflict between the terms of the plan and the confirmation order, the order controls. Thus, the order is an integral part of the construction of the plan. The plan with its implementing documents must be read consistently and coherently with the order and with the order controlling. At paragraph 4 the court approved the implementing documents, but, quote, "consistent with the plan," closed quote.

* * *

Continuing. At paragraph 8 the court discharged current asbestos disease claimants. At paragraph 9, the court ordered that property damage and current asbestos disease claimants be satisfied solely from the Trust with New NGC having no responsibility. But the court did not provide the same expressed provision for New NGC for unknown asbestos disease claims. Rather, the Trust was directed to resolve those claims to the extent feasible. The order does not state that New NGC has no responsibility, as the order did for current and property damage claims. Rather, the order states that New NGC shall not be subject to litigation pending exhaustion of the Trust remedies. That only has meaning if New NGC has liability should the remedies be exhausted without resolving the non-discharged claims. Otherwise, there's no effective difference in treatment and the entire ruling concerning asbestos disease claims becomes meaningless and superfluous. The court went on, however, to bar punitive damages against New NGC, contemplating thereby liability for compensatory damages for non-discharge claims.

At paragraph 9(f), the court provided a mechanism for the appeal of its Bankruptcy Code claim discharge ruling regarding persons exposed to asbestos. The court had recognized the split in authority on its ruling. Some courts have read the definitional section of claims in the Bankruptcy Code to expand non-bankruptcy law meaning of rights to payment, considering the several adjectives used in the definition to be federal standards expanding non-bankruptcy law. This court rejected that reading finding, instead, that the definitions were to be given the non-bankruptcy law meaning. Thus, for example, the word contingent, as a contingent right to

payment, had to be read as a non-bankruptcy contractual law would consider a contingent claim. The same with unliquidated claims. The court rejected the notion of an unmatured tort, as opposed to an unliquidated tort. But the court recognized the split of authority and provided a means to appeal that determination. Should an Appellate Court have reversed, then a permanent injunction would have been imposed on unknown asbestos disease claimants and we wouldn't be here on this motion today. That did not happen. The only reading that makes this ruling not superfluous is to thereby recognize that the plan as confirmed by this court imposed or maintained the liability of New NGC, as the operating entity emerging from the bankruptcy proceeding.

But the court then proceeded to enter a series of provisions that would shield New NGC from litigation. Indeed, the protections were structured in such a manner that New NGC would enjoy that protection well beyond the then foreseeable future. New NGC and its owners, emerging from bankruptcy, namely the trade and bond creditors, would enjoy marketplace activities with a substantial degree of asbestos litigation protection. The court had found that even though the protection was not permanent and final, the extent of liability exposure would have a negligible impact on New NGC's marketplace effective date value. In nearly five years, the court has not received evidence that it was incorrect in that assessment. And so, the unknown asbestos disease claims were channeled to the Trust. The Trust was authorized to continue participating in the Center for Claims Resolution. If the Trust had to go to an alternative facility, the court outlined the facility provisions to

thereby have an alternative method to resolve claims with a continuing shield to New NGC from suit.

At paragraph 10, the court entered its orders on the injunction and channeling. The injunction and discharge applied only to holders of Bankruptcy Code claims. The unknown asbestos disease claimants, who were found not to be Bankruptcy Code claimants, were channeled to the Trust and enjoined from commencing litigation against New NGC, and, for that matter, others ending exhaustion of their Trust remedies. The court defined exhaustion for the benefit of the claimants and others, including New NGC. And the court provided that upon lifting the channeling order, claimants would not be precluded from pursuing rights, if any, under applicable non-bankruptcy law against persons liable to them. But the provision also held that no person was admitting liability. The court also provided that the channeling order with its temporary injunction did not apply to impair the unknown asbestos disease claimants from commencing their rights, including litigation against the Trust and Old NGC, but directed instead that they indeed be channeled to the Trust for that litigation, but subject to the channel lifting provisions. Thus, in the first instance unknown asbestos disease claimants had to commence their litigation and the reorganized NGC. If that process had been exhausted without satisfaction of the claim, the channeling order could be lifted. New NGC would then face litigation, but as to any individual claimant, the claimant would have to prove its tort elements as defined by applicable non-bankruptcy jurisdiction. And New NGC could assert defenses that are appropriate to their particular litigation. The confirmation order implicitly provided for New NGC liability, the confirma-

tion order recognized, however, that New NGC could not be deemed to have admitted liability for any particular claim. The order contemplated tort litigation on a case-by-case basis.

The court should highlight another provision. The court tolled the statute of limitations for unknown asbestos disease claimants to permit the Trust process to be implemented and exhausted. That would have been a meaningless and superfluous order if New NGC had no liability.

At paragraph 29, the court retained the full measure of its Congressionally-established jurisdiction, including enforcing and interpreting the plan and its orders.

The court then appointed the trustees. The court named the trustee the board of director of the reorganized NGC. NGC thereby retained its corporate existence and held certain assets. The Trust became the shareholder of reorganized NGC. New NGC was created to be the operating business entity. The court named its board of directors and officers.

Through three modifications, the plan had been conformed to the court's findings of facts and conclusions of law, with the confirmation order providing that the order governed. The plan was implemented through certain plan documents. Let's examine those, but only to the extent relevant to this particular declaratory judgment action.

The plan at Article 5.1 provided for the Trust and asbestos settlement fund and facilities.

* * *

Under 5.1(d) as modified, the Trust was to extinguish asbestos claims, but, quote, "pursuant to the confirmation order," closed quote. A resolved claim would be resolved as to all entities covered by the plan, including New NGC. But an unresolved, unknown asbestos disease claim would remain subject to the provisions of the confirmation order.

5.3 provided for New NGC. The plan created New NGC at 5.3(a). It was formed as a Delaware corporation. Its purpose was to acquire and continue the business activities and operations of NGC's Gold Bond division, wish was the operation business of the debtor, and other lawful business activities. The court recognizes the debtor had other businesses, such as the ownership of the Austin company, but its operating business at the time was the Gold Bond issue. 5.3(c) made the transfer to New NGC free and clear of claims. But the term claim in the plan was not given a definition, other than that in the Bankruptcy Code. Free and clear of claims is a Section 363 concept. Unknown asbestos disease claimants are not holders of Bankruptcy Code claims. 5.3(d), New NGC did expressly assume certain current obligations of the debtor. That expressed assumption was necessary to enable New NGC to emerge as an operating entity with trade.

* * *

Under 5.2(d), New NGC was directed to perform all the obligations of the debtor, except for asbestos claims, which became the sole responsibility of the Trust. 5.2(d) and 5.3(d) established that New NGC expressly assumed current obligations, which was necessary for its emergence as an operating entity with trade. But the Trust had the sole responsibility under the plan to handle

the asbestos claims. 4.3(e) directed that the asbestos claims be liquidated and resolved through the Trust and its claims facility. But, then the plan in its provisions for the handling of asbestos claims, as confirmed by the court, implicitly imposed liability on New NGC for non-discharged unknown asbestos claimants only and only then if not otherwise resolved by the Trust process. The Trust and the facility provisions are then subject to the confirmation order, including the injunction and channeling provisions and the court's rulings on the claims, which are made a part of the plan by the order that governs and the modifications to the plan. The process thus referenced through 5.3(d) and 4.3(e) and 5.1 includes the order that if the unknown asbestos disease claims are not resolved by the Trust and the channeling order lifts, the unknown asbestos disease claimants may commence tort litigation against New NGC. That's the process. It only has meaning if New NGC has liability. That liability is implicit in this contractual arrangement. Thus, when viewed as a whole and not in an isolated process, New NGC has liability. Otherwise, the order would be meaningless and the order's direction that it govern, superfluous. All these specific subsections must be read as a whole to make the whole consistent and coherent.

As part of the plan implementation, the parties entered an asset purchase agreement. New NGC announced that it was acquiring and Old NGC was conveying the assets, quote, "pursuant to the plan," closed quote. This was not an isolated transfer. This was not a third-party transaction. New NGC was expressly created by the plan. [I]t acquired its asset and its business pursuant to the plan. Every provision of the asset purchase agreement must be read in conjunction with the plan. And by order of this court binding on

plan. And by order of this court binding on New NGC, the plan must be read consistent with the confirmation order. Under Article 2, New NGC expressly assumed certain obligations, as the plan required it to do. Under 2.1(b), New NGC did not assume Old NGC's liability and obligations, quote, "relates to asbestos claims," closed quote, using that as a defined term. Plan at 1.17 defines asbestos claims broadly to include property damage and asbestos disease claims subject to a discharge and covered within the meaning of the Bankruptcy Code and those outside that meaning and not subject to a discharge. This provision thus implements the plan, as confirmed by the court. Had New NGC simply assumed those obligations as a direct responsibility as it did certain other obligations, there would have been no need for the elaborate structure for handling asbestos matters. Indeed, recall that the debtor represented to the court that its bankruptcy filing was driven by bondholder obligations, not by asbestos litigation. Yet, the trade and bondholders claims would be satisfied by their interest in New NGC. To deliver the value on the effective date found by the court, New NGC had to enjoy the maximum amount of protection from asbestos litigation afforded by the law. The channeling order facilitated that. The broad definition permitted the plan drafters to provide in defined terms for the Trust beneficiaries and permitted the asset purchase agreement to shield New NGC by the terms of the plan. The agreement, as I've discussed above, is subject to the plan. The defined term sends the reader to the plan. The plan sets out the structure for asbestos claims resolution and includes the injunction and channeling order provisions, thus the modification. At 5.8 New NGC recognizes that it must perform pursuant to the plan. The agreement at 8.6, rec-

ognizes it is part of a plan and must be read accordingly. 8.10 says the plan controls. The plan is subject to the confirmation order. The confirmation order imposes liability.

The asset purchase agreement purports to transfer free and clear of claims as a defined term. That is consistent with the plan, which limited the concept to the provisions of the Code.

I'll also mention, parenthetically, but it will address what's incorporated into this hearing, the motion to dismiss on jurisdictional grounds is that the asset purchase agreement expressly recognizes that this court has jurisdiction to interpret the agreement.

The record of this adversary proceeding contains certain transcripts of the proceedings before this court. One, a status conference, parties discussed the matter of an expressed assumption of unknown asbestos disease claims liability by New NGC. The court actually questioned why the parties would want to include such a provision. The discharge and channeling orders covered the topic. New NGC had to emerge in the marketplace with the most asbestos litigation protection afforded by law. The asset purchase agreement was subject to the plan and the plan was subject to the confirmation order. The parties, including the Asbestos Committee and the legal representative and the company, were satisfied with the resolution of the matter by the confirmation order. With that resolution, New NGC would face litigation and its liability only if the Trust could not satisfy a claim. As the court intimated in its bench ruling, that day might never come. And it still might never come. The court expressly discussed with the parties at another hearing that the plan structure and the channeling order

afforded New NGC with an opportunity to continually fund the Trust as needed. New NGC may never face tort litigation. There was no need given that confirmation order for an express assumption in the asset purchase agreement. And there still isn't.

Which leads the court back to its order. The confirmation order under 10(b)(2), the injunction for unknown asbestos disease claimants does not preclude the claimant from pursuing his rights, if any, under applicable non-bankruptcy law against any person who may be liable after exhausting the Trust remedies. The court did not preclude New NGC from raising any appropriate defense in that litigation. The court provided that non-bankruptcy law would ultimately dictate the resolution of any particular claim in any particular tort litigation. [T]he Bankruptcy Code itself recognized limited court jurisdiction for Bankruptcy Court personal injury tort claims resolution. This provision recognizes that non-Bankruptcy Code personal injury tort claims, if not resolved, must be adjudicated by non-Bankruptcy Court pursuant to non-bankruptcy law. But that does not mean that New NGC, the creation of a plan of reorganization as confirmed by the court, is not subject to the liability implicitly established by that plan as confirmed by this court. It merely means that the non-Bankruptcy Court must consider this plan and court order as part of that individual litigation.

Justice Scalia's notion of a holistic approach is essential. This case did not only involve asbestos disease claims. It involved asbestos property damage claims with proofs of claims filed, I believe, in excess of $1 billion. It involved bond claims filed in excess of $1 billion. It involved trade claims. It involved substantial

environmental claims throughout the United States. It involved international transactions. It involved a major player in the United States construction industry. And it involved the preservation of thousands of jobs. The plan as confirmed by the court balanced all those interests. By implicitly addressing this asbestos liability, rather than explicitly doing so, and by deferring the matter as provided in the plan, the court enabled New NGC to emerge in the marketplace post-confirmation as an effective entity, posed, under the right market conditions to prosper, and thereby benefit all the constituencies.

The issue may never have arisen. Just like the channeling order may never lift. But, unfortunately, some circumstances have changed. The Trust filed its motion to terminate its participation in the Center. The hearing on that motion involved evidence that suggests that unknown asbestos disease claims may be greater than anticipated by the court at confirmation. And may be greater by 100,000 claims, if not more, so that should the Trust continue in the Center, it may exhaust its current assets somewhere between the years 2005, 6, 7, 8, somewhere in that span, with a substantial number of unpaid claims. The ability of the Center to regulate and control claims resolution per year has been severely hampered by the Supreme Court's *Georgine* ruling. The combination of these developments ripened the New NGC's liability matter. This declaratory judgment action focused on the availability of a tort system remedy for unknown asbestos disease claimants not discharged by the Bankruptcy Code and not satisfied by the Trust. This in turn has a substantial impact on the court's analysis of the Trust's motion to withdraw from the Center. This particular issue raised by the declaratory

action, the confirmation order contemplated would have been deferred until it ripened in an individual case to be considered by another court of competent jurisdiction had the circumstances not changed. But the circumstances have changed. They have ripened. This is a court of competent jurisdiction to make this determination.

Accordingly, pursuant to the plan of reorganization as modified and as confirmed by the order of this court with the order governing, New NGC is liable for non-discharged asbestos disease claims to the extent NGC would have been liable prior to confirmation. I'd ask counsel for the Trust to please prepare a final judgment accordingly.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 1—GENERAL PROVISIONS

§ 105. Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * *

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 524. Effect of discharge

* * *

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such in-

junction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or (cc) a subsidi-

ary of each such debtor that is also a debtor; and (IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or(iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the

court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial

transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforce-

able with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and ,

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to Existing Injunctions.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights

of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 7—LIQUIDATION
SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) t he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case —

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under sec-

tion 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

* * *

TITLE 11—BANKRUPTCY
CHAPTER 11—REORGANIZATION
SUBCHAPTER II—POST-CONFIRMATION MATTERS

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

> **(A)** discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—
>
> > **(i)** a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> >
> > **(ii)** such claim is allowed under section 502 of this title; or
> >
> > **(iii)** the holder of such claim has accepted the plan; and
>
> **(B)** terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(2)

Supreme Court, U.S.
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No. 00-1379

IN THE

Supreme Court of the United States

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

Petitioners,

v.

NATIONAL GYPSUM COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Should this Court review a decision of the Fifth Circuit finding language of an unappealed Chapter 11 plan, confirmation order and assets purchase agreement to be unambiguous, and holding that such documents themselves imposed no liability on the asset purchaser for future state law claims arising from the debtor's torts, and that the purchaser's liability, if any, should be determined under applicable state successor liability law?

STATEMENT PURSUANT TO RULE 29.6

Respondent National Gypsum Company is wholly owned by Delcor, Inc., which is privately held.

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The opinion of the court of appeals (Pet. App. 3a-39a) is reported at 219 F.3d 478. The memorandum opinion and order of the district court (Pet. App. 40a-59a) is reported at 13 Tex. Bankr. Ct. Rep. 350 and is available online at 1999 WL 354230 and 1999 U.S. Dist. Lexis 9379. The bench ruling (Pet. App. 62a-81a) and judgment (Pet. App. 60a-61a) of the bankruptcy court are not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 18, 2000. A petition for rehearing was denied on December 5, 2000. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

The Fifth Amendment to the Constitution and 11 U.S.C. §§ 524(g), 524(h) and 1141 are set forth in relevant part at Pet. 1 and in Petitioners' Appendix. Pursuant to this Court's Rule 14.1(f), the other provision of the Bankruptcy Code relevant to this case, 11 U.S.C. § 101(5), is reproduced in Respondent's Appendix at 324a.

STATEMENT OF THE CASE

This case involves a challenge to the Fifth Circuit's construction of language in the unappealed, Chapter 11 plan of reorganization of the former National Gypsum Company, now known as Asbestos Claims Management Corporation ("Old-NGC" or "ACMC"). The Fifth Circuit ruled that the Plan unambiguously imposed no liability upon Respondent National Gypsum Company ("New-NGC") for future state law asbestos claims arising from Old-NGC's asbestos-related torts (which the Bankruptcy Court ruled were non-Code claims), and that no such liability should be imposed as a matter of federal bankruptcy law. The Fifth Circuit agreed with New-NGC that its liability, if any, for Old-NGC's torts would be a matter of

applicable state successor liability law. The relevant factual and procedural background is described below.

On March 9, 1993, the United States Bankruptcy Court for the Northern District of Texas (Dallas Division) entered an order ("Confirmation Order") confirming the joint chapter 11 plan of reorganization ("Plan"), of Aancor Holdings, Inc. and its wholly owned subsidiary Old-NGC. Under the Plan, the Confirmation Order and the Assets Purchase Agreement ("Assets Purchase Agreement"),[1] New-NGC, a new Delaware corporation, purchased certain assets from Old-NGC's bankruptcy estate. The securities of New-NGC were distributed to financial creditors of Old-NGC and subsequently traded in the public markets after confirmation. The Plan Documents provided that New-NGC would not assume or have any responsibility for any of Old-NGC's asbestos liabilities. Resp. App. 99a-100a; 178a. The Plan created the NGC Settlement Trust (the "Trust") to assume sole responsibility for payment of all present and future asbestos claims. Pet. App. 22a; Resp. App. 89a; 99a-100a. To resolve such claims, the Trust became the sole stockholder of Old-NGC and received over $700 million of insurance and other assets.

The Confirmation Order was not appealed. Nonetheless, in 1998, nearly five years after confirmation, ACMC and the Trust brought a declaratory judgment action in the bankruptcy court against New-NGC asking that court to interpret the Plan Documents to impose liability on New-NGC for asbestos claims that were not cognizable under applicable state law until after confirmation ("Unknown Claims" held by "Unknown Claimants"). New-NGC denied liability and pointed to numerous statements in the Plan Documents and record that New-NGC assumed no liability for such claims.

1. The Plan, the Confirmation Order and the Assets Purchase Agreement are collectively referred to herein as the "Plan Documents." Respondent's Appendix sets forth in full the Plan (Resp. App. A, 1a), the Confirmation Order (Resp. App. E, 261a), and the Assets Purchase Agreement (Resp. App. C, 171a).

The bankruptcy court found that the Plan and the Confirmation Order had "implicitly" imposed liability for Unknown Claims on New-NGC. Pet. App. 65a. While the district court acknowledged that there were "isolated statements" that suggested an opposite conclusion, it ultimately affirmed that ruling. Pet. App. 54a.

The Fifth Circuit reversed, stating that:

> Thus, the Trust and the district court point to no provisions of the Confirmation Order or the Plan that lead to the conclusion that New-NGC was necessarily to be liable for the Unknown Claims should the Trust fail to satisfy them. Neither attempts to argue for alternative interpretations of the provisions set forth by New-NGC; instead, they rely solely on their theory that these are merely "isolated" statements in the documents. New-NGC, on the other hand, points to multiple statements in the record, and numerous provisions in the relevant documents, that are consistent only with its position that it should not be liable to the Unknown Claims unless they can establish state-law successor liability.
>
> Proper textual interpretation does not allow us to ignore those statements or to adopt an "implicit" meaning that would render all of these provisions meaningless, and we need not defer to the bankruptcy court's interpretation of this *unambiguous text*. Nor does our interpretative role require us to ignore other extrinsic evidence, such as the bankruptcy court's discussion of non-bankruptcy law and successor liability, that is consistent with the text.

Pet. App. 27a-28a (emphasis added).[2]

2. Contrary to Petitioners' assertion that the Fifth Circuit found the documents ambiguous, *see* Pet. 8, that court expressly held the relevant text was "unambiguous."

1. Negotiation of the Plan and Assets Purchase Agreement

Chapter 11 is principally a consensual process, and for that process to work, each interested group must have a representative to negotiate on its behalf. The financial creditors ("Financial Creditors"), owed roughly $1.1 billion, were represented by a committee (the "BT Committee") appointed under 11 U.S.C. § 1102. Creditors whose claims were derived from exposure to asbestos and whose claims were then cognizable under state law ("Current Claimants" holding "Current Claims") were owed roughly $127 million and were represented by a second Section 1102 committee (the "Asbestos Committee"). Resp. App. 249a. Unknown Claims were projected to be $695 million to $764 million, though, as recognized by everyone, including the bankruptcy judge, this was only an estimate. *Id.* Unknown Claimants were represented in the case by a legal representative (the "Legal Representative") appointed on their behalf by the bankruptcy court. Pet. App. 5a; Resp. App. 223a-224a.

Together, Old-NGC, the BT Committee, the Asbestos Committee and the Legal Representative negotiated a plan of reorganization for Old-NGC. The initial plan established a value division between the Financial Creditors, and the Current Claimants and the Unknown Claimants. In exchange for the $1.1 billion owed to them, the Financial Creditors would look to Old-NGC's Gold Bond Building Products division ("Gold Bond"), valued at $350 million, assuming asbestos litigation protection. Resp. App. 239a. Asbestos claimants would receive Old-NGC and all of its assets. These included The Austin Company, a design, engineering and construction firm and a wholly-owned subsidiary of Old-NGC worth $125 million; $600 million aggregate, face amount of insurance coverage available to pay asbestos claims; certain insurance-related claims; and $10 million from New-NGC. Pet. App. 5a-7a; Resp. App. 239a; 249a-252a.

With this division of value, while Financial Creditors would receive on average 33% of the amount they were owed,

Pet. App. 6a, the Plan provided the likelihood, but not a guarantee, that the Trust assets would be sufficient to pay all present and future asbestos disease claims, particularly if the *Georgine* settlement ultimately was approved. Pet. App. 7a. (*Georgine* contemplated a global settlement of asbestos-industry claims; the settlement was ultimately overturned by this Court in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).)

A draft plan of reorganization ("Initial Plan") was written to implement this agreement. Old-NGC was to be renamed (as it eventually was) Asbestos Claims Management Corporation and two new entities were to be created, the Trust and New-NGC. New-NGC was to be incorporated as a Delaware corporation after confirmation. The Current Claimants and the Unknown Claimants were to be the beneficiaries of the Trust, while the Financial Creditors would receive all of the new common stock of New-NGC.

The Initial Plan contained four key structural steps to implement the value division between the Financial Creditors and the Asbestos Claimants: (1) New-NGC, as a new Delaware corporation, would start with no liabilities; (2) New-NGC would purchase the Gold Bond assets under the Assets Purchase Agreement free and clear of liabilities, claims and interests to the greatest extent permitted under the Bankruptcy Code; (3) New-NGC would contractually assume certain non-asbestos debts of Old-NGC, but would explicitly not assume liability for any asbestos claims; and (4) a permanent injunction would be issued against all asbestos claimants, both current and future, barring any suits on those claims against any person (other than the Trust), including New-NGC.

The Initial Plan provided, therefore, not only that the Trust would be established and would assume sole responsibility for all asbestos claims, including Unknown Claims, but also that the Confirmation Order would contain a channeling order and permanent injunction that would channel all asbestos claims, including Unknown Claims, to the Trust for resolution and

forever bar the assertion of any asbestos claims against, among others, New-NGC. Resp. App. 125a-126a.

2. The Bankruptcy Court's January 1993 Ruling

In considering the Initial Plan, in January 1993, the bankruptcy court concluded that it lacked the power to take step 4, that is, to impose a permanent injunction against non-Code claims. This was based on the bankruptcy court's disputed view that, because the Unknown Claims were not yet cognizable under applicable state law, they were therefore not Bankruptcy Code claims under Section 101(5). Resp. App. 257a. Given that ruling, those claims could not be enjoined over the Legal Representative's objection. That meant that the permanent injunction needed to be recrafted, but the other structural steps — the purchase of assets by a new corporation to be owned by creditors and the express non-assumption of asbestos liabilities — were approved by the bankruptcy court and accordingly left in place, unaltered.

At a hearing on February 24, 1993, the parties brought the question of how to rewrite the Plan Documents — including the Assets Purchase Agreement and permanent injunction — to the bankruptcy court for its assistance and resolution:

> MS. FERAZZI [Asbestos Committee Counsel]: . . . With respect to the other documents that we have not taken the laboring oar on, we are at the closest point possible for resolving the documents without further guidance from the Court. A lot of the issues that we are at an impasse on relate to some of the issues that have been addressed today. *That has to do with whether or not new NGC is going to be released forever, or will have all the asbestos claims extinguished as to new NGC.*
>
> There is a problem that has arisen in the documents about *whether or not new NGC has to assume or continue to assume the liability for future asbestos claims down the road.* It is our position

that the claims will arise and that the claims will be assertable against reorganized NGC and any successors. That would also include new NGC. The channeling order protects all of the entities, including reorganized NGC, the Austin Company, and new NGC from asbestos liability, but it does not extinguish those entities from future claims.

The discharge and the permanent injunction applies to the present claims. This philosophical issue keeps presenting itself when we're trying to craft the assumption of liability section of the asset purchase agreement as well as the indemnification provisions.

THE COURT: Until I see those I don't know whether I can comment. I am inclined to make one statement, and that is I don't know why the new company should be assuming any — it seems to me it should go unaddressed. The Court has already provided that if these future claimants are satisfied,[3] there is no permanent injunction and then that triggers the dispute is new NGC a successor, what liability is there under whatever the applicable corporate law would be.

I know the Court [has] held that the Court has made sure that those future claimants are protected to the extent that they're not paid by not having a statute of limitations defense thrown at them. *My concern is if you start getting into the dispute on document drafting, you will be necessarily changing by corporate document what the Court would anticipate would just be whatever the application is of the appropriate jurisdiction statute.*

MS. FERAZZI: Your Honor, we're not attempting to eliminate the defenses that new NGC

3. Presumably, "not satisfied."

> would have to any claims that may be asserted down the road. What we are trying to prevent is a sale free and clear of all liens, claims and encumbrances that would trap the asbestos claims and somehow give them an injunction.
>
> THE COURT: That's what my findings are. The Court has found what the claims are, and the Bankruptcy Code permits free and clear of those claims. The Court addressed it. There's obviously — there are parties in this room in disagreement with the Court. But the Court has addressed that, and thereby permits applicable Committees to the Bankruptcy Code to be implemented. *My only concern is if you're not in dispute as to what to put on any document with a new entity, maybe that's simply left better to the application to whatever governing law would be, nonbankruptcy governing law, in the event that there's anything to fight about, in the event that some claims in the future.*

Hearing Transcript 88-91 (emphasis added).

Earlier in that hearing, the bankruptcy court made the same point:

> THE COURT: . . . It's simply if the funds end, despite all these efforts to control its assets and while fairly treating clients the fund [i]s unsuccessful and there are several claims remaining, the bar ends and *they can proceed with their rights, and new NGC can defend and say we're not a successor. . . .*

Hearing Transcript 75 (emphasis added).

3. The Revised Confirmed Plan

The end result was that the permanent injunction itself was split, with a permanent injunction against Code claimants — the Current Claimants — and a temporary injunction, pending exhaustion of remedies against the Trust, against Unknown Claimants. Resp. App. 160a-165a.

The core structural protections for New-NGC — the creation of a new corporation, the express non-assumption of asbestos liabilities, the purchase free and clear and the revised injunction — were implemented through the key documents in the case:

- *Section 6 of the Confirmation Order.* Section 6 expressly approved the Assets Purchase Agreement and ordered that the assets sold thereunder were to be transferred to New-NGC "free and clear of all Liens, Claims, Interests and other liabilities . . . *to the maximum exten[t] permitted by the Bankruptcy Code.* . . ." Resp. App. 267a (emphasis added).
- *Section 2.1(b) of the Assets Purchase Agreement.* Section 2.1(b) states that "[n]otwithstanding anything contained in this Section 2.1 to the contrary, [New-NGC] shall not assume, covenant to pay, perform, observe the terms of, satisfy and/or discharge any liability or obligation of [Old-NGC] to the extent such liability and obligation: (i) relates to Asbestos Claims. Resp. App. 178a. The Assets Purchase Agreement adopted the definition of "Asbestos Claims" in the Plan, Resp. App. 172a, and that term includes Unknown Claims. Resp. App. 28a; 156a-157a.
- *Section 2.4(b) of the Assets Purchase Agreement.* Section 2.4 further provides that, except as expressly assumed or otherwise required under any final order of the bankruptcy court, "[New-NGC] does not hereby assume, *and shall not be deemed to have assumed*, any liabilities or obligations of [Old-NGC] of any kind or nature, known, unknown, contingent, or otherwise, by reason of any theory of law or equity." Resp. App. 182a. (emphasis added).
- *Section 5.2(d) of the Plan.* Section 5.2(d) provides that New-NGC is not responsible for asbestos liabilities: "Upon consummation of the Merger and this Plan,

New-NGC shall perform all of the obligations of the Debtors under this Plan (*except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the [Trust]*)." Resp. App. 99a-100a (emphasis added).

- *Section 10(b)(2) of the Confirmation Order.* Section 10(b)(2) created the Channeling Order. It temporarily channeled Unknown Claimants to the Trust pending exhaustion of Trust remedies. If an Unknown Claimant exhausts Trust remedies without resolving his or her claim, then the claimant would be free to pursue non-bankruptcy remedies, if any exist, against other persons:

> "Nothing contained in [the Channeling Order] however, shall preclude an Unknown Asbestos Disease Claimant from pursuing his rights, *if any, under applicable non-bankruptcy law, against any Person* who may be liable to such Unknown Asbestos Disease Claimant after exhausting the remedy or remedies provided by the [Trust]. . . . *Nothing contained in this Section 10(b)(2) or elsewhere in this Order shall constitute an admission of any liability or obligation for any Unknown Asbestos Disease Claims.*"

Resp. App. 286a (emphasis added).

The Plan, including the Assets Purchase Agreement, was the subject of extensive negotiations among various parties in interest. The bankruptcy court found at confirmation that "the Plan . . . [was] the product of arm's-length negotiations among various parties-in-interest." Resp. App. 244a, contradicting petitioners's repeated and unsubstantiated statements to the contrary in the Petition.[4]

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4. *See* Pet. 3 ("by means of a non-arms-length asset purchase agreement"); Pet. 15 ("Moreover, the Plan transaction was not an arms-

(Cont'd)

Indeed, after the ruling that Unknown Claims were not Code claims, the Legal Representative and his attorney together devoted 81 hours solely to reviewing and negotiating the terms of the Assets Purchase Agreement, for which they received fees of $18,000, and other professionals for the Asbestos Committee devoted 145 hours to the agreement alone and received fees in excess of $48,000. On March 3, 1993, at the conclusion of Assets Purchase Agreement negotiations, Sander L. Esserman, the attorney for the Legal Representative, advised the bankruptcy court that the Legal Representative had "work[ed] very hard on the asset[s] purchase agreement" and was satisfied that the Assets Purchase Agreement "has been negotiated in good faith by both sides and all parties, and we look forward to it being presented."

4. *Georgine* and the Alternate Claims Facility

In May 1996, the Third Circuit set aside the *Georgine* settlement, a result ultimately affirmed by this Court. Petitioners describe that as the event leading to the current litigation, *see* Pet. 5, but this ignores key features of the Plan that addressed precisely that contingency. In its bench ruling of January 29, 1993, which was incorporated by reference into the Confirmation Order, Resp. App. 259a, the bankruptcy court recognized that the *Georgine* settlement might not be approved by the federal district court to which it was presented. As a result, the Plan took into account the possibility that the *Georgine* settlement would not move forward. The Plan set out two payment approaches, one to apply if *Georgine* was implemented and the Trust could afford to remain in the tort system, the second denominated the "Alternate Asbestos Disease Claims Resolution Facility" ("Alternate Facility"), to be used if *Georgine* was overturned and the Trust's assets proved

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(Cont'd)
length third party purchase."). We believe these statements to be misstatements of fact, but think that they do not go to the issues that would be before this Court were certiorari granted. *See* Supreme Court Rule 15.2.

insufficient to pay asbestos claimants full tort system values. Section 9(g)(2) of the Confirmation Order sets out this structure. Resp. App. 277a-280a.

The Trust therefore initially would resolve claims through the Center for Claims Resolution (the "CCR"), the joint defense facility established in 1988 by Old-NGC and nineteen other former asbestos companies. Resp. App. 95a-97a; 277a-280a. The Trust would resolve asbestos claims as Old-NGC had done so prior to bankruptcy, and asbestos disease claimants would continue to receive full tort system payments on their liquidated claims, unless and until projected tort system values of asbestos claims exceeded the projected value of the Trust's assets.

As the bankruptcy court held during a January 29, 1993 bench ruling, however, the mandate of the Trust would be to use its assets to give all claims, whether current or unknown, "substantially equivalent" treatment. ("The Trust is structured to assure that all persons exposed to asbestos from NGC asbestos-containing products receive a similar percentage payment of a liquidated value of their claim.")

The Plan recognized that, if the Trust could not pay asbestos claims in full, the Trust would have to terminate its membership in the CCR (where claims were paid at tort system values), and implement the Alternate Facility (where claims would be paid on a pro rata basis). *Id.* The Plan expressly recognized that this was a likely result if the then-pending *Georgine* settlement was not approved or if the Trust obtained less proceeds than were expected in the insurance litigation. *Id.*

The terms of the Alternate Facility were developed and approved by the Asbestos Committee and the Legal Representative, and attached to and incorporated in the Plan and the Trust Agreement as Exhibit A. The Alternate Facility provided for the ratable distribution of Trust assets to all projected claimants in order to preserve "sufficient resources to pay future valid [asbestos disease claims] on a substantially equivalent basis."

Petitioners fail to mention the Alternate Facility in their Petition, but it provided key protection for future asbestos claimants. Whether the Trust resolved claims through the CCR (and paid 100% of the liquidated values) or the Alternate Facility (and paid claimants a smaller, ratable portion of Trust assets), at the confirmation hearing, the bankruptcy court found in a January 29, 1993 bench ruling that "Asbestos Disease Claimants, even under the worse-case scenarios, should receive in satisfaction of their claims, a higher dividend than the average received b[y] the [commercial] creditors. . . ."

5. The Instant Litigation

As detailed above, notwithstanding that the asbestos claims were the "sole responsibility" of the Trust and notwithstanding the fact that the Plan explicitly provided for the Alternate Facility to be invoked to satisfy the Trust's sole obligation to give all asbestos claimants "substantially equivalent" treatment, Petitioners used the overturning of the *Georgine* settlement as a basis for filing in the bankruptcy court a declaratory judgment action asking the court to interpret the Plan Documents to impose liability on New-NGC for the Unknown Claims. At the time the suit was brought, far from being an empty shell,[5] Petitioners held nearly $400 million in assets to pay asbestos

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5. Petitioners' first question presented characterizes Old-NGC, as of the date of confirmation, as a "non-operating shell corporation." Pet. i. That characterization was flatly rejected by the Fifth Circuit:

> Moreover, Old-NGC was no "empty shell" following bankruptcy: It retained hundreds of millions of dollars of assets, including the stock of the Austin Company, and it is still paying asbestos claims and suing insurance companies.

Pet. App. 32a.

Pursuant to Supreme Court Rule 15.2, we believe that Petitioners mischaracterize Old-NGC's position after confirmation, and that, given the framing of the first question presented, this mischaracterization would bear on the issues that would be before the Court were certiorari granted.

claims. The Trust reasoned that, with such adjudication, it could avoid the Plan requirements to implement the Alternate Facility and reduce payment amounts to present asbestos claimants to preserve assets for Unknown Claimants. During the course of appeals, the Trust introduced the alternative argument that New-NGC also has liability for non-Code asbestos claims under the Bankruptcy Code.

The bankruptcy court's ruling that it had "implicitly" imposed liability on New-NGC under the Plan Documents in confirming the Plan, the district court's affirmance, and the Fifth Circuit's conclusion to the contrary on the "unambiguous text" of the relevant documents led to the Petition.

REASONS FOR DENYING THE WRIT

Petitioners cannot meet the standards under Rule 10 of this Court for the grant of a petition. Petitioners' argument proceeds from the erroneous premise that the Fifth Circuit has misconstrued the Plan Documents, though at no point in their Petition do petitioners explain how the documents have been misunderstood. Indeed, Petitioners make *no* effort to address the documents on their own terms. Instead, petitioners challenge what they now see as the consequences of these documents given, in the words of the Fifth Circuit, that "the only sensible reading [of the Plan and Plan Documents] is that all Persons, including New-NGC, were exposed to the possibility that Unknown Claimants might some day be allowed to pursue a remedy against them if one existed under applicable non-bankruptcy law." Pet. App. 21a. In doing so, Petitioners conveniently ignore the fact that their challenges should have been raised on direct appeal of the bankruptcy court decisions resulting in the confirmation of the Plan, not through a collateral attack under a declaratory judgment action five years later. These subsequent collateral attacks are especially pernicious where, as here, securities have been traded in public markets in reliance on the expiration of appeals periods.

It is understandable that petitioners do not spill much ink on the details of the Plan Documents. The Fifth Circuit's opinion

is a straightforward application of well-settled bankruptcy rules and precedent, including those that give effect to the plain meaning of words in a reorganization plan and refuse to create a federal bankruptcy cause of action for state law, non-Code claims. As the Fifth Circuit concluded, Petitioners are wrong on the merits, but perhaps more importantly for present purposes, it is extraordinarily difficult to make out an issue worthy for this Court's attention in such a fact and document intensive context, and Petitioners have not done so here.

I. The Petition Should Be Denied, as:

(1) Petitioners Cannot Satisfy Rule 10 of this Court;

(2) Any Supposed Conflict between the Plan Documents and Section 1141 is Self-Correcting; and

(3) Any Challenge to the Plan Documents Should Have Been Made on Direct Appeal and Now Has Been Waived.

Rule 10 sets forth the reasons that a petition might be granted, and Petitioners cannot satisfy those reasons. Petitioners do not even attempt to make out a conflict between the decision of the Fifth Circuit and that of another court of appeals or of this Court. There simply is no such conflict — the law is not unsettled — and this Court should defer consideration of the issues presented by the petition until such a conflict is presented. That will give the issues a chance to percolate, to allow the courts of appeals' views on these issues to either harmonize or to present conflicts in sharply-defined real cases where the issues will be well posed.

Petitioners also do not suggest that the Fifth Circuit has departed from "the accepted and usual course of judicial proceedings." The Fifth Circuit's decision was a garden-variety application of well-understood bankruptcy doctrine to the "unambiguous text" of the Plan Documents. Petitioners can do little more than suggest the Fifth Circuit made a factual error in its interpretation of the Plan Documents, but that provides no basis for the grant of the Petition.

Petitioners rest on the notion that this case "presents issues of fundamental national importance." Pet. 9. That is plainly wrong, and one of the reasons why also explains Petitioners' inability even to hint at a circuit conflict: Different plan documents would have avoided the purported conflict with Section 1141 or with the Due Process clause. If Petitioners are right about the consequences of these particular plan documents, which were consented to by all relevant parties, including the Legal Representative acting on behalf of Unknown Claimants, the supposed "problem" is self-correcting.

Similarly-situated parties who see themselves as disadvantaged by these particular provisions will simply not agree to them next time. The Plan Documents could not have been implemented without the consent of the Asbestos Committee acting on behalf of the Current Claimants and the Legal Representative acting on behalf of the Unknown Claimants. In a fantasized future tobacco case, if any, Pet. 20, a legal representative in that case could simply reject the supposedly problematic provisions.[6] Given the ability of parties to protect themselves going forward and the infinite variation possible in plans of reorganization, the interpretation of a particular provision in an unappealed reorganization plan is hardly an issue of national importance.

Moreover, it is settled doctrine that a plan of reorganization that violates the Bankruptcy Code must be challenged on direct appeal, otherwise the plan is res judicata as confirmed.

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6. Or of course they might very well agree to the same terms again. This was a negotiated result, with all parties giving up something. Petitioners are now seeking a "heads I win, tails you lose" result. The terms of the Plan Documents were agreed to consensually, and the coin having been flipped, Petitioners sought to recut the consensual agreement by filing the declaratory judgment action.

We would also note that the match between this case and the supposed future tobacco case is particularly poor. The tobacco companies intend to continue to sell cigarettes. In contrast, New-NGC has *never* manufactured a product containing asbestos and even Old-NGC stopped producing products containing asbestos by 1981.

Stoll v. Gottlieb, 305 U.S. 165 (1938); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987). If the petitioners truly believed that the terms of the Plan and Confirmation Order were unfair and provided "a roadmap," Pet. 17, for mass tort defendants to escape liability, they could have, and should have, appealed and sought a plan that imposed liability upon New-NGC rather than one that placed "sole" responsibility for such claims on the Trust.[7] There was, however, no appeal pursued from entry of the Confirmation Order, and its provisions are now res judicata.

Moreover, in reliance on the plain terms of the Plan and Confirmation Order, millions of shares of New-NGC stock have been publicly traded. Participants in those markets relied on the expiration of appeals periods. Petitioners now ask this Court to overturn the unappealed Plan through a collateral attack and find that some never-before accepted doctrine of law or public policy requires that future asbestos claimants who hold no Code claims nevertheless have a federal Bankruptcy Code remedy against New-NGC which is contrary to the express terms of the Plan. This would be bad law and bad policy.

II. The Fifth Circuit's Ruling is Fully Consistent with Section 1141.

On the merits, the Section 1141 claim is at best a red herring. We should start with points of agreement. No one contends that Unknown Claims have been "discharged," as that term is used in the standard technical bankruptcy sense in Section 1141. The ruling of the bankruptcy court that Unknown Claims were not Code claims meant that those claims were outside the scope

7. Of course, the Financial Creditors would have been unwilling to go forward with any asset purchase on such terms. Old-NGC would then have been liquidated and its assets distributed pro rata to Code creditors. As noted by Justice O'Connor in her concurrence in *Ohio v. Kovacs*, 469 U.S. 274, 285-86 (1985), Unknown Claimants would have been left with no bankruptcy distribution based on the bankruptcy court's finding that they did not hold Code claims and no person to sue given the dissolution of the debtor.

of the discharge. The Unknown Claims survived the bankruptcy case, and that is true with or without the Fifth Circuit's ruling.

Petitioners contend that the Fifth Circuit's ruling means that the claims are "effectively" discharged, as they believe that claims brought under state-law successor liability will fail. Pet. 16-17. We certainly hope that is right, but Petitioners err when they leap from that point to the conclusion that New-NGC must be liable for Unknown Claims as was Old-NGC. Pet. 13. Petitioners regard the weak rights of Unknown Claimants under state successor liability law as evidence of a conflict with Section 1141.

We don't understand the logic of this position. As the Fifth Circuit found, as a matter of federal bankruptcy law and policy, there is simply no basis for this position, and such a conclusion would be contrary to the careful structure of the Plan Documents. Under the bankruptcy court's January 1993 ruling, the Unknown Claims were not Section 101(5) claims and therefore could not be discharged or permanently enjoined under Section 1141. This decision reflected the limits of federal bankruptcy power over the Unknown Claimants, at least as understood by the bankruptcy judge. *Any person* who would have been protected by such a discharge or permanent injunction would not be. And, indeed, "any person" turns out to mean just that, as the injunction set forth in Section 6.5 of the Plan covered a long list of designated entities, including New-NGC, but also covered "any other Person."[8] The failure to discharge or permanently enjoin the Unknown Claims does not *impose* liability on any person, including New-NGC, for those claims. It means only that Old-NGC remains liable for those claims. The liability of any other person for those claims, including the supposed liability of New-NGC, would have to be established through some other means.

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8. Resp. App. 125a-126a. Section 1.162 of the Plan defined "Person(s)" as "any individual, firm, corporation, association, partnership, joint venture, trust, or other entity." Resp. App. 62a.

How? Under state law, not under federal bankruptcy law. This Court has held that the substantive rights of claimants in a bankruptcy proceeding are governed by state law, not federal common law. *See Butner v. United States*, 440 U.S. 48, 55 (1979).[9] The question here is whether under applicable state law anyone other than Old-NGC became liable for the undischarged Unknown Claims. For New-NGC that question becomes under applicable state law, under what circumstances does a corporation that purchases assets become liable for the debts of the seller? There is no federal bankruptcy law of successor liability, and *Butner* directs us to state law on this question. This is precisely what the bankruptcy court stated would happen at the February 24, 1993 hearing, *supra* at 6-8.

Petitioners point to the language of Section 6 of the Confirmation Order authorizing the transfer of assets from Old-NGC's bankruptcy estate to New-NGC "free and clear of all Liens, Claims, Interests and other liabilities . . . to the maximum exten[t] permitted by the Bankruptcy Code" as somehow making New-NGC liable for Unknown Claims. Pet. 13-14. The natural reading of this language, of course, is precisely that New-NGC took the assets free and clear of the Unknown Claims, but the bankruptcy court seemingly did not intend the language to immunize New-NGC in this case. Nonetheless, it is certainly clear that there was *no* attempt through this language to affirmatively *impose* liability on New-NGC for the Unknown Claims and even Petitioners cannot torture this language sufficiently to reach that result. Remember that New-NGC was a freshly-minted Delaware corporation; it started with a clean slate. Something had to make New-NGC liable for the Unknown Claims if it was to have that liability.

As Petitioners recognize, Pet. 16, the usual rule is that an asset purchaser does not succeed to the liabilities of its seller.

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9 *See also Atherton v. FDIC*, 519 U.S. 213, 218 (1997) ("'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress' not the federal courts") (citation omitted).

The parties to the bankruptcy proceeding made doubly sure of that here, as Sections 2.1(b) and 2.4(b) of the Assets Purchase Agreement specifically provided that New-NGC would not assume any asbestos obligations. The only possible route to liability for New-NGC is through a state-law exception to the general rule just described, namely, through state-law successor liability. That takes us full circle to the point that under *Butner*, New-NGC's possible liability for Unknown Claims must be traced to state-law, and this takes us to state-law successor liability, as the bankruptcy court stated at the February 24, 1993 hearing.

These points are even more compelling in the present circumstances. Petitioners claim that New-NGC's purchase of assets was not arm's-length, and that New-NGC should not be entitled to the full range of protections received by a purchaser. Pet. 3, 15. First, that claim is squarely contradicted by the bankruptcy court's finding in the Confirmation Order that "the Plan . . . [was] the product of arm's-length negotiations among various parties-in-interest." Resp. App. 244a. This of course reflects the reality. These were hotly-contested negotiations. More value to the Current Claimants or Unknown Claimants meant less for the Financial Creditors, and vice versa. All of the negotiators — the BT Committee on behalf of the Financial Creditors, the Asbestos Committee and the Legal Representative — had lawyers, investment bankers and experts in asbestos claims assessments. These were adverse, arm's-length negotiations.

Second, Petitioners' effort to somehow denigrate the purchase by the Financial Creditors fully misses the mark. The Financial Creditors would have preferred to have just been paid in cash, in full at confirmation rather than purchase the assets. That wasn't going to happen, and the Financial Creditors were just looking to make the best of a bad situation. As the Fifth Circuit noted:

> This is not a case in which Old-NGC has won approval of a plan to bail out its shareholders, "forcing asbestos victims to surrender their claims in exchange for a meager" portion of the company's assets. [cite omitted] Instead, Old-NGC's chapter 11 bankruptcy was motivated at least as much by the $1.1 billion owed to bond and trade creditors as by the $800 or $900 million estimated liability for current and future asbestos disease claims. The bankruptcy court adopted a Plan whereby all the current and future asbestos disease claims were expected to be paid in full by the Trust, while the bond and trade creditors received only $350 million in assets in exchange for their $1.1 billion in claims. This $750 million reduction in debt was sufficient "consideration," notwithstanding the Trust's arguments to the contrary.

Pet. App. 34a-35a.

No other purchaser was prepared to offer more for Old-NGC's assets. Again, as the Fifth Circuit noted:

> [t]here is . . . good reason why we would want to encourage these types of reorganizations and to enforce the express terms of the deal to which the parties have agreed. All sides were adequately represented during bankruptcy proceedings, and legal representatives were appointed for current and future asbestos claimants and for commercial creditors and the company. Negotiations were extensive, and the legal representative successfully blocked court approval of the Draft Plan, which permanently would have enjoined even state-law successor claims against New-NGC. Still, despite this setback, the commercial creditors were willing to give more in value to Old-NGC for Gold Bond than were any other purchasers, and we should be

> hesitant to change the terms of the deal after the fact just because subsequent developments in the *Georgine* settlement have resulted in the Unknown Claims' being underfunded in the Trust.

Pet. App. 33a-34a.

While the Petitioners seek to establish in this Court the proposition that a debtor facing mass tort liability cannot sell assets in bankruptcy to a corporation formed by the debtor's financial creditors without subjecting the asset purchaser to federal bankruptcy law liability for future claims, such a doctrine not only has no precedential support, but it also fails to pass muster as a policy matter. As the National Bankruptcy Review Commission ("NBRC") — for which Professor Warren, co-counsel for the Petitioners, was the reporter — has observed:

> Freeing the productive assets of the business from the uncertainty of mass future claimants will encourage buyers to offer a better price. In so doing, more assets would be available to fund a greater return for present claimants and holders of mass future claims. At the same time, this approach promotes the equitable treatment of similar creditors by ensuring the holders of mass future claims do not receive preferential treatment over the debtor's other creditors by following assets on a successor liability theory, nor would they receive worse treatment by being omitted from participation in the benefits from the sale even if they live in a jurisdiction that does not recognize successor liability.

NBRC, Bankruptcy: The Next Twenty Years: National Bankruptcy Review Commission Final Report, at 349 (1997). Courts have time and again made the same point. Indeed, the only cases or commentators that have advocated some form of a federal bankruptcy successor liability rule espouse one that

rejects the imposition of successor liability because of the need to maximize the value of the bankruptcy estate.[10]

Another important policy here counsels in favor of denying the petition. Financial and other creditors need to be able to rely on the enforceability of court-approved agreements reached during reorganization proceedings, or courts will be unlikely to obtain such agreements in the future.[11] Particularly where, as here, countless securities transactions have occurred involving New-NGC stock in reliance on the Plan's provisions and the related Disclosure Notice to Old-NGC creditors, courts should be reluctant to overturn a deal such as the one resulting in the unappealed Plan and Confirmation Order.[12]

Finally, Petitioners also argue that the Fifth Circuit's ruling makes it possible to evade Section 524(g) of the Bankruptcy Code. This argument has been waived as it was not presented to the lower courts in a timely fashion, but, instead, was raised for the first time in Petitioners' request for en banc rehearing by the Fifth Circuit. In any event, the argument is entirely without merit.

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10. *See, e.g., Paris Indus. Corp. v. Ace Hardware Corp.*, 132 B.R. 504, 510 n.14 (D. Me. 1991); William T. Bodoh & Michell M. Morgan, Inequality Among Creditors: The Unconstitutional Use of Successor Liability To Create a New Class of Priority Claimants, 4 Am. Bankr. Inst. L. Rev. 325, 330 (1996) ("application of successor liability to bankruptcy sales thwart[s] the policy goals underlying the Bankruptcy Code").

11. *In re IBI Security Service, Inc.*, 133 F.3d 205, 210 (2d Cir. 1998) (rewriting bankruptcy agreements would be "unwise" and "might well have a damaging effect on future creditors' willingness to compromise claims and cooperate with the bankruptcy process").

12. *See, e.g., Matter of Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (noting importance of protecting "the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented"); *In re Continental Airlines*, 91 F.3d 553, 561 (3d Cir. 1996) (en banc) (where stock or other transactions have occurred in reliance on the plan, "the strong public interest in the finality of bankruptcy reorganizations is particularly compelling").

First, 524(g) — a 1994 Code amendment passed after the March 1993 Confirmation Order in this case — has nothing to do with the imposition of liability upon an asset purchaser such as New-NGC. It merely provides a statutory safe harbor for a bankruptcy court wishing to impose a permanent injunction against all future asbestos claims. The Fifth Circuit did not construe the Plan as imposing any such injunction. The findings that New-NGC is not liable for Unknown Claims as a matter of federal law, but has potential liability for them under state law, hardly threaten to make the vastly greater protection provided by Section 524(g) obsolete. Petitioners repeatedly equate the failure to enjoin permanently with an imposition of liability, and they do so again here. Section 524(g) does not impose liability on anyone for any claims; it simply — or not so simply in truth — sets out the terms under which a protective injunction will or will not be granted. There is no way to go from the failure to grant an injunction to an affirmative imposition of liability, and Section 524(g) does not bridge that chasm.

Second, contrary to the assertion of Petitioners that Section 524(g) is the only way for a bankruptcy court to deal with future asbestos claims (Pet. 17), Congress was merely creating a safe harbor and was not otherwise limiting the power of bankruptcy courts to craft other remedies in these difficult situations.[13] Indeed, to make this crystal clear, Section 111(b) of the Bankruptcy Reform Act of 1994 set forth an uncodified rule of construction:

> (b) Rule of Construction. — Nothing in subsection (a), or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to

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13. *See* Congressional Record—House of Representatives Tuesday, October 4, 1994, Bankruptcy Reform Act of 1994, 140 Cong. Rec. H10752-01, H10766 ("Section [524(g)] . . . is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan [of] reorganization.")

> issue injunctions in connection with an order confirming a plan of reorganization.

See P.L. 103-394, Section 111(b). Petitioners fail to mention this rule of construction or otherwise explain it away.

Third, Sections 524(g) and (h) were added largely to address uncertainty regarding the validity of injunctions entered in asbestos bankruptcy cases to that date.[14] Congress blessed the results in these prior cases,[15] while establishing a more general framework that parties would be confident would be effective in other cases.

III. No Constitutional Issue is Implicated.

Finally, Petitioners argue that the Fifth Circuit's "interpretation of the Plan violates the Due Process rights of absent persons." Pet. 20. This argument is completely without merit. First, this issue also had never before been briefed or argued by the Petitioners prior to their request for rehearing en banc, and it has never been addressed in the opinions of the lower courts. To the extent that the argument could have existed at all, it has been waived or abandoned.

Second, as the Fifth Circuit recognized, the Unknown Claimants were represented by the Legal Representative, who received all notices and actively participated in the case, including the negotiation of the Assets Purchase Agreement. Pet. App. 33a-34a; Resp. App. 223a-224a. Our legal system routinely contemplates that one person will act for another, such

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14. *See* 1994 U.S. Code Cong. and Admin. News 3349 ("Nevertheless, lingering uncertainty in the financial community as to whether the injunction can withstand all challenges has apparently made it more difficult for the company to meet its needs for capital and has depressed the value of its stock").

15. Indeed, the essential elements required for retroactive approval under Section 524(h) are all present here, including approval of the Plan by present asbestos claimants, approval by the legal representative for future claimants, and ownership of the debtor by a trust established for the benefit of present and future asbestos claimants.

as when a guardian ad litem is appointed. There is thus no meaningful claim of the absence of fair representation in this case.

We therefore find misguided Petitioners' citation to *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1998) and its requirement that future claimants receive "notice and opportunity to be heard." Pet. 21. The Legal Representative was an active participant in Old-NGC's bankruptcy case, and any objection to that role should have been appealed directly. Of course, no objection was filed and no appeal was made. If Petitioners' Due Process claim is about notice and opportunity to heard, Petitioners are wrong on the merits, and the argument has in any event been waived.

Petitioners' position seems to be that the alleged Due Process violation arises from the Fifth Circuit's decision itself. Petitioners, however, do little more than argue that the Fifth Circuit erred in its construction of the Plan Documents and that that amounts to a violation of Due Process. That argument of course might make any alleged judicial error in the interpretation of plan documents, or, more generally, any contract, into a supposed violation of Due Process.

All of these documents were negotiated and approved consistent with Due Process. The bankruptcy judge well understood that Due Process required that Unknown Claimants be represented so that they could receive notice and have an opportunity to be heard, and they were represented through the Legal Representative. The Legal Representative played an active role in negotiating the Plan Documents, and expressly approved them on behalf of his constituency. Again if these procedures were thought to be defective, they should have been challenged on direct appeal of the Confirmation Order, not five years later by the very Trust created to carry out the provisions of the Plan.

In any event, Petitioners are simply wrong if they believe that, on the interpretation of the Fifth Circuit, a terrible wrong was done to Unknown Claimants giving rise to a Due Process

violation. It was the original ruling of the bankruptcy court that Unknown Claims were not claims under Section 101(5) of the Bankruptcy Code that severely limited the position of Unknown Claimants in the bankruptcy case. As Justice O'Connor recognized in her concurring opinion in *Kovacs*, non-Code claimants have no right to a distribution from the bankruptcy estate. *Supra* at 17, note 7. In a chapter 7 liquidation, non-Code claimants receive nothing, and no assets are put into a trust to be reserved for their future claims. The assets of the estate are sold to third parties for cash — assuming buyers exist—and the cash is distributed to existing claimants. Purchasers of these assets will take free and clear of claims and interests to the greatest extent permitted by the Bankruptcy Code.

Consider the financial position of the Unknown Claimants after confirmation. Unknown Claims were not discharged, so there was no termination of their rights. Indeed, the Plan left Unknown Claimants in a better position than Current Claimants. The Trust mandate was to treat Current Claimants and Unknown Claimants substantially equally. Current Claimants could only sue ACMC and the Trust, however, while Unknown Claimants, if unable to have their claims resolved by ACMC and the Trust, may sue "any Person" under applicable non-bankruptcy law. If the Plan as written and agreed to by the Financial Creditors had not been confirmed, on the other hand, Old-NGC would have been liquidated under Chapter 7 and Unknown Claimants would have received nothing.

Leaving non-Code claimants with access to a large Trust — with hundreds of millions of dollars in assets — as well as potential state law remedies against asset purchasers and other potentially liable parties is hardly unconstitutional. In fact, if the Trust were correct that the rights of future tort claimants have somehow been unconstitutionally terminated here, then the same is true in every asset sale.[16] Future tort claimants,

16. The purchase of assets in bankruptcy by a new corporation owned by creditors is no different in result than if the assets of (Cont'd)

however, do not have a constitutional right to a recovery (much less a federal bankruptcy one) against a corporation purchasing assets of the tortfeasor — particularly where, as here, the purchase agreement explicitly provided for no assumption of any asbestos liabilities; was negotiated by the Legal Representative for Unknown Claimants and approved by the bankruptcy court in an unappealed Confirmation Order; resulted in the extinguishment of more than $1 billion of debt owed to financial creditors by the selling tortfeasor; and permitted a reorganization of the debtor resulting in a pot of money providing hundreds of millions of dollars to future claimants that would otherwise have been unavailable.

These facts distinguish this case from *Ortiz*. Moreover, *Ortiz* involved separate treatment for current asbestos creditors and future creditors; here, Current Claimants and Unknown Claimants received the same rights against the Trust. *Ortiz* presented a square conflict of interest by having some of the same attorneys representing current and future claimants. Here, a separate Legal Representative was appointed for the Unknown

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(Cont'd)
Old-NGC had been sold to other parties (either before or during bankruptcy) and the proceeds were then distributed to Old-NGC's existing creditors, including the Financial Creditors. In this case, however, as the Fifth Circuit correctly observed, the Financial Creditors were willing to pay more than any other potential purchaser, thereby increasing the value of the bankrupt estate. *See* Pet. App. 34a.

A sale itself for fair consideration, as found here, has no adverse impact on future claimants' rights or ability to recover. Given the fair consideration paid, the selling tortfeasor has at least as many assets with which to satisfy claims after the sale as it did before; its assets are simply in different, more liquid form. In this case, moreover, the sale to New-NGC left Old-NGC with *more* assets with which to satisfy future, non-Code claims, since the Financial Creditors — who held Code claims and were therefore entitled to priority over non-Code claims with respect to property of the estate — extinguished more than $1 billion of Old-NGC debt in exchange for securities of New-NGC worth only $350 million.

Claimants. In *Ortiz*, there were no substantial financial creditors; here Financial Creditors were owed over $1 billion. In fact, Judge Smith — the very Fifth Circuit judge who dissented in the decision overturned in *Ortiz* — wrote the majority opinion in the instant case and pointedly criticized Petitioners' efforts to equate the two situations. Pet. App. 33a-34a.

Petitioners appear to believe that the Financial Creditors had some distinctive obligation to make sure that the Unknown Claimants were paid in full, seemingly through some open-ended right of the Unknown Claimants to pursue New-NGC and thereby transfer value away from the Financial Creditors to the Unknown Claimants. This is plainly wrong. The Financial Creditors had just as much right to finality as to their claims in the bankruptcy case as did any other creditor. As the Fifth Circuit noted, this was not a case where equity was preserved, not a case where "Old-NGC has won approval of a plan to bail out its shareholders." As the Court emphasized, *Ortiz*, of course, was just such a case ("[M]ost notably, Fibreboard was allowed to retain virtually its entire net worth"). *Ortiz*, 527 U.S. at 859. Petitioners see the Financial Creditors as creating new hurdles by not taking equity in Old-NGC, Pet. 23-24, but nothing required these creditors, *and only these creditors*, to take that equity risk. Selling the assets to New-NGC was part and parcel of the financial deal made between the Legal Representative, the Current Claimants and the Financial Creditors and cannot now be ignored.

The bankruptcy court held that Unknown Claimants did not have Bankruptcy Code claims, and confirmed a Plan that imposed no liability for Unknown Claims on New-NGC, which was not the debtor but was, instead, a new corporation formed under Delaware law. Leaving these non-Code claimants to their state law rights, if any, against New-NGC under state successor liability laws implicates no constitutional doctrine; granting them recovery against New-NGC under the Plan despite the Plan's express contrary terms, however, would raise serious

constitutional issues.[17] There is a powerful policy against creating federal law remedies for state law claims, particularly in the bankruptcy area, and it is plainly not unconstitutional for this Court to leave state law, non-Code claimants with their state law remedies against any other persons, including those, if any, against New-NGC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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17. *See generally* Bodoh & Morgan, *supra* note 10.

APPENDIX

APPENDIX A — FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION DATED SEPTEMBER 4, 1992

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CASE NO. 390-37213-SAF/11
(CHAPTER 11)

IN RE: NATIONAL GYPSUM COMPANY,

Debtor.

CASE NO. 390-37214-SAF/11
(CHAPTER 11)

IN RE: AANCOR HOLDINGS, INC.,

Debtor.

JOINTLY ADMINISTERED

FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

Dated: As of September 4, 1992

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[Exhibits have been intentionally omitted]

Appendix A

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CASE NO. 390-37213-SAF/11
(CHAPTER 11)

IN RE: NATIONAL GYPSUM COMPANY,

Debtor.

CASE NO. 390-37214-SAF/11
(CHAPTER 11)

IN RE: AANCOR HOLDINGS, INC.,

Debtor.

JOINTLY ADMINISTERED

FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

INTRODUCTION

NATIONAL GYPSUM COMPANY, a Delaware corporation, and **AANCOR HOLDINGS, INC.**, a Delaware corporation, the Debtors and Debtors in Possession (as hereinafter defined) in the above captioned and numbered

chapter 11 reorganization cases, propose the following First Amended and Restated Joint Plan of Reorganization pursuant to the provisions of chapter 11 of the Bankruptcy Code (as hereinafter defined), dated as of September 4, 1992. For purposes hereof, any term used in an initially capitalized form in this First Amended and Restated Joint Plan of Reorganization shall have the defined meaning ascribed to it in *Article I* hereof unless the context otherwise requires.

Reference is hereby made to the Disclosure Statement (as hereinafter defined) of National Gypsum Company and Aancor Holdings, Inc., which discusses the history of National Gypsum Company and Aancor Holdings, Inc., and their respective businesses, management, properties, and other assets. The Disclosure Statement also provides a summary of this Plan. **YOU ARE URGED TO READ WITH CARE THE DISCLOSURE STATEMENT OF NATIONAL GYPSUM COMPANY and AANCOR HOLDINGS, INC. IN EVALUATING HOW THIS PLAN WILL AFFECT YOUR CLAIMS OR INTERESTS.**

ARTICLE I

DEFINITIONS

Unless the context otherwise requires, the following terms shall have the following meanings when used in initially capitalized form in this Plan. Such meanings shall be equally applicable to both the singular and plural forms of such terms. Any term used in initially capitalized form in this Plan that is not defined herein but that is used in the Bankruptcy Code, shall have the meaning ascribed to such

term in the Bankruptcy Code. Additionally, the rules of construction contained in section 102 of the Bankruptcy Code apply to the construction of this Plan.

1.1 *"Aancor"* means Aancor Holdings, Inc., a Delaware corporation, a Debtor and Debtor in Possession in Reorganization Case No. 390-37214-SAF/11.

1.2 *"Aancor Administrative Claim"* means any Administrative Claim against Aancor.

1.3 *"Aancor General Unsecured Claim"* means any Unsecured Claim against Aancor.

1.4 *"Aancor Other Priority Claim"* means any Other Priority Claim against Aancor.

1.5 *"Aancor Priority Tax Claim"* means any Priority Tax Claim against Aancor.

1.6 *"Aancor Secured Claim"* means any Secured Claim against Aancor.

1.7 *"Aancor Stock Purchase Agreement(s)"* means any one or more of: (a) that certain Stockholders' Agreement, dated as of April 29, 1986, between Aancor and the Interestholders holding the shares of the Existing Aancor Common Stock; and (b) that certain Registration Rights Agreement, dated as of April 29, 1986, between Aancor and such Interestholders, which agreement relates to the stockholders' agreement described in *clause (a)* hereof.

1.8 *"Administrative Claim"* means any Claim for the payment of any administrative cost or expense of a kind specified in section 503(b) of the Bankruptcy Code that is entitled to a priority in payment under section 507(a)(1) of the Bankruptcy Code.

1.9 *"Affiliate"* means, with respect to each Debtor, an affiliate of such Debtor as the term *"Affiliate"* is defined in section 101(2) of the Bankruptcy Code; *provided, however,* that where the context so requires, the term *"debtor"*, when used in section 101(2) of the Bankruptcy Code, may mean an entity to which the defined term *"Affiliate"* refers. *"Affiliate"* shall also mean and include an *"affiliate"* as defined in Rule 12b-2 promulgated under the Exchange Act, as amended.

1.10 *"Aggregate Claims Amount"* means, with respect to any Class or Classes of Claims, the total amount (including Estimated Amounts of any Contingent or Disputed Claims) of Claims, including Disputed Claims (but excluding Disallowed Claims), in such Class or Classes; *exclusive, however*, of any amounts attributable to the application and enforcement of the NGC Senior Rights, if any, of the Claimants in any such Classes.

1.11 *"Allowed or Allowed Amount"* means the dollar amount of an Allowed Claim or Allowed Interest; *provided, however*, that the Allowed Amount of a Claim shall not exceed the Estimated Amount of such Claim or Interest as determined by the Bankruptcy Court or, where required, the District Court, pursuant to an Estimation Order.

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1.12 *"Allowed Claim"* or *"Allowed Interest"* means a Claim against, or Interest in, either of the Debtors, allowable under section 502 of the Bankruptcy Code, to the extent that: (a) either (1) such Claim is listed by either of the Debtors in its Schedules as liquidated in amount and not disputed or contingent or (2) a Proof of Claim or Proof of Interest was timely filed, deemed filed, or, with leave of the Bankruptcy Court, late filed with the Bankruptcy Court; and (b) either (1) as to which a party in interest, either of the Debtors, or Reorganized NGC, as the case may be, has not timely filed an objection, or (2) such Claim or Interest either is Allowed by a Final Order or is otherwise provided for in this Plan. The term *"Allowed Claim"* shall also include any Asbestos Claim which is Allowed pursuant to either the Asbestos Disease Claims Resolution Facility or the Asbestos Property Damage Claims Resolution Facility. The only Allowed Interests in the Debtors are the Interests in the Existing NGC Common Stock and the Existing Aancor Common Stock. Unless otherwise specified in this Plan, an *"Allowed Claim"* shall not include any amount for punitive damages or penalties or any amount of interest which may have accrued from and after the Petition Date on any such Claim; *provided, however*, that if this Plan is confirmed pursuant to section 1129(b) of the Bankruptcy Code, the NGC Senior Rightholders shall not be prejudiced from pursuing their rights to recover the interest which accrues from and after the Petition Date on the Allowed Amounts of the Claims of such NGC Senior Rightholders from the distributions which would otherwise be made to Claimants whose Claims are contractually subordinate in status and priority to the Claims of such NGC Senior Rightholders. If, however, NGC Class 4A and NGC Class 5 accept this Plan, then upon the Effective

Date, the Claimants holding Allowed NGC Debt Securities Claims and Allowed NGC Senior General Unsecured Claims in NGC Classes 4A and 5 shall not be entitled to seek such post-petition interest notwithstanding the Confirmation of this Plan with respect to either NGC Class 6 or NGC Class 7 pursuant to section 1129(b) of the Bankruptcy Code; *provided, however*, that the foregoing shall be without prejudice to, and shall not limit the ability of, the Claimants holding Allowed Claims in NGC Classes 4A and 5 from asserting their respective rights to post-petition interest and any other NGC Senior Rights at the Confirmation Hearing of this Plan pursuant to section 1129(b) of the Bankruptcy Code. Nothing contained herein shall in any way limit the right of either of the Debtors to request the Bankruptcy Court to designate, pursuant to section 1126(e) of the Bankruptcy Code, any Claimant as an entity whose acceptance or rejection of this Plan was not in good faith or was not solicited or procured in good faith or in accordance with the provisions of chapter 11 of the Bankruptcy Code.

1.13 *"Alternate Asbestos Disease Claims Resolution Facility"* means a dispute and claims resolution facility (which claims resolution facility would be an alternative to the CCR under the conditions described in **Section 5.1(m)(2)** of this Plan) pursuant to which all Asbestos Disease Claims may be liquidated and resolved in accordance with the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, which claims resolution facility shall substantially comply with, and conform to, the BI Claims Resolution Guidelines.

1.14 *"Asbestos Claim(s)"* means Asbestos Disease Claims and Asbestos Property Damage Claims (or any of them).

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1.15 *"Asbestos Claims Resolution Facilities"* means the Asbestos Disease Claims Resolution Facility and the Asbestos Property Damage Claims Resolution Facility (or either of them).

1.16 *"Asbestos Committee"* means the Official Committee of Asbestos Claimants of National Gypsum Company appointed in the Reorganization Case of NGC by the United States Trustee for the Northern District of Texas.

1.17 *"Asbestos Disease Claim"* means any Claim (including any Unknown Asbestos Disease Claim) against, or any debt, obligation, or liability of, either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiaries), and their present or former employees (including, without limitation, all thereof in the nature of or sounding in tort, contract, warranty, or any other theory of law, equity, or admiralty) for, relating to, or arising by reason of, directly or indirectly, physical, emotional, or other personal injuries or damages (whether or not diagnosable before Confirmation of this Plan) caused or allegedly caused, in whole or in part, directly or indirectly, by asbestos or asbestos-containing products and arising or allegedly arising, directly or indirectly, from acts or omission of either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiaries) (or another person, firm, corporation, or other entity for or with which either of the Debtors or their respective Affiliates or subsidiaries [other than Austin or any Austin Subsidiaries] is or may be liable, including, without limitation, any Claim [including any Contribution Claim], debt, obligation, or liability for compensatory damages [including, without

limitation, loss of consortium, proximate, consequential, general and special damages], punitive damages, reimbursement, indemnity, warranty, contribution, and subrogation; *provided, however*, that the Asbestos Disease Claims do not include worker's compensation or other statutory Claims for compensation by an employee against an employer, Asbestos Property Damage Claims and NGC Environmental Claims); and *provided further*, that Asbestos Disease Claims as used herein may include causes of action or demands that are not *"Claims"* within the meaning of section 101(5) of the Bankruptcy Code.

1.18 *"Asbestos Disease Claims Resolution Facility"* means the dispute and claims resolution facility to be implemented on the Effective Date, or as soon thereafter as practicable, for the purpose of liquidating and resolving all Asbestos Disease Claims pursuant to the terms of this Plan and the NGC Asbestos Settlement Fund Documents, which facility, as of the Effective Date, will be either: (a) the CCR, unless NGC's membership therein is terminated either by Order of the Bankruptcy Court before the Effective Date or by the occurrence of any of the other events described in **Section 5.1(m)(2)** of this Plan or (b) the Alternate Asbestos Disease Claims Resolution Facility.

1.19 *"Asbestos Disease Expenses"* means all costs and expenses of the NGC Asbestos Settlement Fund attributable to Asbestos Disease Claims, determined on a Cash basis (including, without limitation, compensation, legal, accounting, and other professional fees and expenses relating to the operation of the Asbestos Disease Claims Resolution Facility), disbursements and related expenses, corporate

overhead and reimbursement payments, other than payments to Asbestos Disease Claimants or reimbursements of such payments.

1.20 *"Asbestos Disease Sharing Allocation"* means that portion of the NGC Asbestos Settlement Fund Assets which is allocated to resolving and satisfying Asbestos Disease Claims in accordance with the terms and conditions of the Plan and the NGC Asbestos Settlement Fund Documents, which allocation shall be determined and, where applicable, adjusted pursuant to the terms and conditions contained in **Section 5.1(k)** of this Plan.

1.21 *"Asbestos Fund Expenses"* means any of the Asbestos Disease Expenses and the Asbestos Property Damages Expenses, and any other operating expenses of the NGC Asbestos Settlement Fund.

1.22 *"Asbestos Fund Expenses Commitment"* means the commitment of New NGC and the Debtor to fund an aggregate sum of $10 million for the purpose of paying the Asbestos Fund Expenses, which sum shall be payable in accordance with **Section 5.1(f)(1)** of this Plan.

1.23 *"Asbestos Insurance Debtor Action Recoveries"* means the rights of NGC or Reorganized NGC to any and all proceeds or other relief from: (a) any award, judgment, relief, or other determination entered or made as to any Asbestos Insurance Debtor Action; (b) any and all amounts payable by an Insurance Company under any Asbestos Insurance Settlement Agreement; and (c) any and all proceeds of any Insurance Policy paid or payable to Asbestos

Claimants, to the NGC Asbestos Settlement Fund or to the Asbestos Claims Resolution Facilities, on account of Asbestos Claims.

1.24 *"Asbestos Insurance Debtor Actions"* means all claims, causes of action and enforceable rights of NGC against any Insurance Company, including, without limitation, the Stonewall Litigation, arising from or related to: (a) any such Insurance Company's failure to provide Insurance Coverage for Asbestos Claims under any Insurance Policy; (b) the refusal of any Insurance Company to compromise and settle any Asbestos Claims, pursuant to any such Insurance Policy; or (c) the interpretation or enforcement of the terms of any such Insurance Policy with respect to Insurance Coverage for Asbestos Claims.

1.25 *"Asbestos Insurance Settlement Agreement"* means any settlement agreement with a Settling Insurance Company relating to Insurance Coverage for Asbestos Claims, or for costs, payments or expenses associated with Asbestos Claims.

1.26 *"Asbestos Property Damage Claim"* means any Claim against, or any debt, obligation, or liability of, either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiaries), and the present or former employees (including, without limitation, all thereof in the nature of or sounding in tort, contract, warranty, or any other theory of law, equity, or admiralty) for, relating to, or arising by reason of, directly or indirectly, property damage (including, without limitation, diminution in the value thereof) or environmental damage or economic

loss related thereto caused or allegedly caused, directly or indirectly, in whole or in part by the presence of asbestos or asbestos-containing products in buildings and arising or allegedly arising, directly or indirectly from acts or omissions of either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiary) (or another person, firm, corporation, or other entity for or with which either of the Debtors or their respective Affiliates or subsidiaries [other than Austin or any Austin Subsidiary], is or may be liable, including, without limitation, any Claim [including any Contribution Claim], debt, obligation, or liability for compensatory damages [including, without limitation, proximate, consequential, general, and special damages], punitive damages, reimbursement, indemnity, warranty, contribution, and subrogation; *provided, however*, that Asbestos Property Damage Claims do not include Asbestos Disease Claims or NGC Environmental Claims).

1.27 *"Asbestos Property Damage Claims Resolution Facility"* means the dispute and claims resolution facility to be implemented on the Effective Date, or as soon thereafter as practicable, for the purpose of liquidating and resolving all Asbestos Property Damage Claims in accordance with the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, which claims resolution facility shall substantially comply with, and conform to, the PD Claims Resolution Guidelines.

1.28 *"Asbestos Property Damage Expenses"* means all costs and expenses of the NGC Asbestos Settlement Fund attributable to Asbestos Property Damage Claims, determined on a Cash basis (including, without limitation,

compensation, legal, accounting and other professional fees and expenses related to the operation of the Asbestos Property Damage Claims Resolution Facility), disbursements and related expenses, corporate overhead and reimbursement payments, other than payments to Asbestos Property Damage Claimants or reimbursements of such payments.

1.29 *"Asbestos Property Damage Sharing Allocation"* means that portion of the NGC Asbestos Settlement Fund Assets which is allocated to resolving and satisfying Asbestos Property Damage Claims in accordance with the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, which allocation shall be determined and, where applicable, adjusted pursuant to the terms and conditions contained in **Section 5.1(k)** of this Plan.

1.30 *"Asbestos Sharing Allocation(s)"* means the Asbestos Disease Sharing Allocation and the Asbestos Property Damage Sharing Allocation (or either of them).

1.31 *"Assets Purchase Agreement"* means that certain Assets and Stock Purchase Agreement, to be dated as of the Effective Date, between NGC, as seller, and New NGC, as buyer, for the purchase by New NGC of the NGC Sale Assets free and clear of all liens, claims and encumbrances pursuant to section 1123(a)(5)(D) of the Bankruptcy Code, which purchase agreement shall be substantially in the form set forth in the Plan Documents.

1.32 *"Assets Sale"* means the sale by NGC of the NGC Sale Assets to New NGC pursuant to the Assets Purchase Agreement.

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1.33 *"Assets Sale Proceeds"* means all proceeds realized and received (or to be realized and received) by NGC from the Assets Sale, *less*: (a) the costs and expenses of sale, including, without limitation, attorneys' fees, accounting fees, brokerage and investment banking fees, recording and registration expenses, title insurance expenses, and escrow costs and expenses; (b) taxes (both domestic and foreign) paid or payable as a result thereof; and (c) all costs and expenses related to the assumption and assignment of all executory contracts and unexpired leases which constitute a part of the NGC Sale Assets, including the costs of curing all pre-petition defaults under such contracts and leases pursuant to section 365(b) of the Bankruptcy Code.

1.34 *"Austin"* means The Austin Company, an Ohio corporation, a wholly-owned Subsidiary of NGC.

1.35 *"Austin Corporate Documents"* means: (a) the amendments to the articles of incorporation and bylaws of Austin and (b) the other related documents to be executed, delivered and filed with the appropriate governmental authorities by the Effective Date pursuant to this Plan, the Plan Documents, and applicable state law, which may be necessary or appropriate for the implementation of this Plan and the transactions contemplated in the Plan Documents.

1.36 *"Bankruptcy Code"* means the Bankruptcy Reform Act of 1978, title 11, United States Code, as now in effect or as hereafter amended.

1.37 *"Bankruptcy Court"* means either the United States Bankruptcy Court for the Northern District of Texas, Dallas

Division, having jurisdiction over the Reorganization Cases or, to the extent the reference has or may be withdrawn, the District Court sitting as a court of bankruptcy.

1.38 *"Bankruptcy Rules"* means, collectively the Rules and Forms of Practice and Procedure in Bankruptcy promulgated under 28 U.S.C. § 2075, as amended, and the local rules of the Bankruptcy Court, as applicable to reorganization cases, together with all amendments and modifications from time to time thereto.

1.39 *"Base Property Damage Allocation"* means, as of the Initial Asset Valuation Date, the sum of $137.5 million, which sum shall be adjusted as set forth in **Section 5.1(k)(2)** hereof.

1.40 *"BI Claims Resolution Guidelines"* means those certain guidelines for the Alternate Asbestos Disease Claims Resolution Facility contained in the NGC Asbestos Claims Resolution Procedures.

1.41 *"BI Fund Advisory Committee"* means a committee, consisting of three (3) members to be appointed pursuant to **Section 5.1(o)(1)** of this Plan on or before the Effective Date, which shall be formed for the purpose of consulting with and advising the Fund Administrators regarding the administration of the NGC Asbestos Settlement Fund and the liquidation and resolution of Asbestos Disease Claims in accordance with the terms and conditions contained in this Plan and the NGC Asbestos Settlement Fund Documents.

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1.42 *"Binning's"* means Binning's Building Products, Inc., a Delaware corporation.

1.43 *"Binning's Option"* means that certain option to purchase 49% of the issued and outstanding common stock of Binning's for an option price of $00.01 per share granted to NGC pursuant to that certain compromise and settlement agreement, dated August 28, 1991, which agreement was approved by the Bankruptcy Court by an Order dated August 28, 1991.

1.44 *"Business Day"* means any day other than a Saturday, Sunday or *"legal holiday"*, as that term is defined in Bankruptcy Rule 9006(a).

1.45 *"Cash"* means lawful currency of the United States of America and its equivalents.

1.46 *"Center for Claims Resolution"* or *"CCR"* means the Center for Claims Resolution, a non-profit corporation established pursuant to the Producer Agreement Concerning Center for Claims Resolution, dated September 28, 1988, for the purpose of administering, handling and resolving asbestos bodily injury claims against participating procedures on a fair, efficient and economical basis.

1.47 *"Claim"* means (when used in an initially capitalized form in this Plan): (a) a right of payment from either Debtors, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) a right to an equitable remedy

for breach of performance if such breach gives rise to a right of payment from either of the Debtors, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

1.48 *"Claimant"* means a holder of a Claim against either Debtor.

1.49 *"Class"* means a category of holders of Claims or Interests as classified in **Article II** of this Plan.

1.50 *"Closing"* means the consummation of the Assets Sale as contemplated by the Assets Purchase Agreement.

1.51 *"Confirmation"* or *"Confirmation of this Plan"* means the entry by the Bankruptcy Court of the Confirmation Order.

1.52 *"Confirmation Date"* means the date on which the Confirmation Order becomes a Final Order.

1.53 *"Confirmation Hearing"* means the hearing(s) which will be held before the Bankruptcy Court in which the Debtors will seek Confirmation of this Plan.

1.54 *"Confirmation Order"* means the Order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

1.55 *"Consummation"* means the accomplishment of all things contained or provided for in this Plan and the

entry of an Order of Consummation finally closing the Reorganization Cases.

1.56 *"Consummation Date"* means the date on which the Order of Consummation becomes a Final Order.

1.57 *"Contingent"* means (whether or not such term is used in an initially capitalized form in this Plan), when used with respect to a Claim, a Claim that has not accrued and which is dependent upon a future event that may never occur.

1.58 *"Contribution Claims"* means all Unsecured Claims for contribution, reimbursement or indemnity (as those terms are defined by the non-bankruptcy law of the relevant jurisdiction) that are: (a) held by: (1) Persons (other than past or present officers, directors or employees of either of the Debtors) who have been, are or may be defendants or respondents in an action or proceeding seeking damages (A) for asbestos-related bodily injury or property damage, environmental clean-up or response costs, or natural resources damages or (B) arising out of any other cause of action, or (2) any assignee or transferee of any such Person; and (b) asserted against either of the Debtors or, if applicable, the NGC Asbestos Settlement Fund for reimbursement of a portion of any damages any such Person has paid or may pay to the Persons asserting such claims.

1.59 *"Debtor(s)"* means Aancor and NGC (or either of them).

1.60 *"Debtor Action Recoveries"* means the rights of either of the Debtors to any and all proceeds or other relief

from: (a) any award, judgment, or relief, or any sanction, waiver, or denial of fees and expenses (but only to the extent such sanction, waiver, or denial is payable to, or accrues to the benefit of, the Estate of NGC), or other determination rendered or made as to any Debtor Action and payable to the Estate of either Debtor or (b) any compromise or settlement of any Debtor Action.

1.61 *"Debtor Actions"* means objections to Claims under the appropriate provisions of the Bankruptcy Code and any and all other claims, causes of action, demands, and enforceable rights of either of the Debtors against third parties, including, without limitation, claims of either of the Debtors: (a) for recovery or avoidance, as the case may be, of (1) obligations, transfers of property or interests in property, offsets, debt forgiveness, Cash, and other types or kinds of property or interests in property (or the value thereof), recoverable or avoidable pursuant to sections 544, 545, 547, 548, 549, and 550 of the Bankruptcy Code, (2) damages, general or exemplary (or both), or other relief, relating to (or based upon) (A) indebtedness owing to either Debtor, (B) fraud, negligence, gross negligence, willful misconduct, or any other tort actions, (C) breaches of contract, (D) violations of federal or state securities laws, (E) violations of applicable corporate laws, (F) breaches of fiduciary or agency duties, and (G) causes of action based on disregard of the corporate form or piercing the corporate veil or other liability theories, and (3) damages or other relief based upon any other claim, cause of action, or demand of either Debtor to the extent not specifically compromised or released pursuant to this Plan or an agreement referred to, or incorporated into, this Plan; and (b) for subordination under

sections 509 and 510 of the Bankruptcy Code or under other applicable laws; *provided, however*, that Debtor Actions do not include Insurance Debtor Actions or Asbestos Insurance Debtor Actions.

1.62 *"Debtor(s) in Possession"* means Aancor and NGC (or either of them), as debtors in possession.

1.63 *"Disallowed Claim"* means any Claim (or any portion thereof) against either of the Debtors which has been disallowed pursuant to the applicable provisions of the Bankruptcy Code, including, without limitation, any Claim disallowed pursuant to section 502(e) of the Bankruptcy Code.

1.64 *"Disbursing Agent"* means New NGC or any Person (including any Existing NGC Indenture Trustee if the Debtors so elect) selected by the Debtors (or either of them) pursuant to this Plan (with approval of the Bankruptcy Court), as agent of the Bankruptcy Court to hold and distribute the consideration to be distributed to the Claimants holding Allowed Claims (other than Asbestos Claims) under this Plan.

1.65 *"Disclosure Statement"* means the First Amended and Restated Joint Disclosure Statement under Section 1125 of the Bankruptcy Code for Solicitation of Acceptances of the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc., dated as of September 4, 1992, including all annexes, exhibits and schedules attached thereto or referenced therein (and the exhibits, if any, to any such annexes, exhibits and schedules),

prepared by the Debtors pursuant to section 1125 of the Bankruptcy Code and approved by the Bankruptcy Court, as such Disclosure Statement may be further amended or modified from time to time.

1.66 *"Disputed Claim"* or *"Disputed Interest"* means any Claim against, or Interest in, either of the Debtors: (a) that is listed in such Debtor's Schedules as disputed, contingent or unliquidated, including all Asbestos Claims; (b) that is listed in such Debtor's Schedules as undisputed, liquidated and not contingent and as to which a Proof of Claim or Proof of Interest has been filed with the Bankruptcy Court, to the extent that such Proof of Claim or Proof of Interest exceeds the amount for such Claims or Interests set forth in such Debtor's Schedules; (c) that is not listed in such Debtor's Schedules, but as to which a Proof of Claim or Proof of Interest has been filed with the Bankruptcy Court; or (d) as to which an objection has been filed; provided, however, that the Bankruptcy Court may estimate a Disputed Claim for purposes of allowance pursuant to section 502(c) of the Bankruptcy Code. If there is a dispute as to the classification of a Claim or Interest, such Claim shall be considered a Disputed Claim or Interest in its entirety for the purposes of this Plan.

1.67 *"Disputed Claims Reserve"* shall have the meaning ascribed to such term in Section 5.12(c) of this Plan.

1.68 *"Distribution Date"* when used with respect to each Allowed Claim, means a date which is as soon as practicable after the later of: (a) the Effective Date, or (b) the first (1st) Business Day of the next calendar quarter after

the date upon which the Claim becomes an Allowed Claim, unless the Claim becomes an Allowed Claim within fifteen (15) days before the first (1st) Business Day of the next calendar quarter, in which case the Distribution Date shall be the first (1st) Business Day of the next succeeding calendar quarter.

1.69 *"District Court"* means the United States District Court for the Northern District of Texas, or the unit thereof having jurisdiction over the matter in question.

1.70 *"Effective Date"* means, and shall occur on, the first Business Day immediately following the later of: (a) thirty (30) calendar days after the Confirmation Date, and (b) the first date upon which each of the conditions to occurrence of the Effective Date contained in Section 9.2 of this Plan has been satisfied or waived; provided, however, that the Effective Date may occur at a point in time when the Confirmation Order is not a Final Order at the sole option of the Debtors unless the effectiveness of the Confirmation Order has been stayed or vacated, in which case the Effective Date shall be such date as is thirty (30) calendar days following the expiration or other termination of any stay of effectiveness of the Confirmation Order; and further provided that the Effective Date shall not occur until each of the conditions to occurrence of the Effective Date set forth in Section 9.2 of this Plan has been satisfied or waived by the Debtors, and, where applicable, by the Asbestos Committee and the Legal Representative.

1.71 *"Environmental Laws"* means: (a) the Comprehensive Environmental Response, Compensation and Liability

Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C.A. section 9601 et seq.; (b) the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendment of 1984, 42 U.S.C.A. section 6901 et seq.; (c) the Clean Air Act, 42 U.S.C.A. section 7401 et seq.; (d) the Clean Water Act of 1977, 33 U.S.C.A. section 1251 et seq.; (e) the Toxic Substances Control Act, 15 U.S.C.A. section 2601 et seq.; (f) all other laws by any Governmental Units relating to air pollution, water pollution, noise control and/or the handling, discharge, existence, disposal or recovery of on-site or off-site hazardous, toxic or dangerous waste, substances or materials, as each of the foregoing may be amended from time to time; and (g) the ordinances, rules, regulations, orders, notices of violation, requests, demands and requirements issued or promulgated by such Governmental Units in connection with such statutes and laws.

1.72 *"Estate"* means, as to each Debtor, the estate created for that Debtor by section 541 of the Bankruptcy Code upon the commencement of its Reorganization Case under chapter 11 of the Bankruptcy Code.

1.73 *"Estimated Amount"* means the maximum amount at which the Bankruptcy Court or where required by applicable law, the District Court, estimates any Claim (or Class of Claims) against either of the Debtors which is contingent, unliquidated or disputed, including, without limitation, any Asbestos Claim or NGC Environmental Claim, for the purpose of: (a) allowance under section 502(c) of the Bankruptcy Code; (b) assisting the Bankruptcy Court in making the findings required for Confirmation of this Plan

pursuant to sections 1129(a)(7)(A)(ii) and (a)(11) and, if necessary, sections 1129(b)(1) and (2) of the Bankruptcy Code; or (c) temporarily allowing a Disputed Claim or Disputed Interest solely for the purpose of accepting or rejecting this Plan pursuant to Bankruptcy Rule 3018(a).

1.74 *"Estimation Order"* means an Order of the Bankruptcy Court or, where required by applicable law, the District Court, that determines the Estimated Amount of any Claim (or Class of Claims), against either of the Debtors for any of the purposes set forth in Section 1.11 of this Plan.

1.75 *"Exchange Act"* means the Securities Exchange Act of 1934, as amended from time to time, and the regulations and rulings issued pursuant thereto.

1.76 *"Existing Aancor Common Stock"* means the shares of the common stock of Aancor, $.01 par value, issued by Aancor and outstanding on the Petition Date.

1.77 *"Existing Austin Common Stock"* means the shares of the common stock of Austin, $1.00 par value, issued by Austin and outstanding on the Petition Date.

1.78 *"Existing NGC Common Stock"* means the shares of the common stock of NGC held by Aancor, $1.00 par value, issued by NGC and outstanding on the Petition Date.

1.79 *"Existing NGC Debt Securities"* means, collectively, the NGC Priority Senior Subordinated Notes, the NGC Senior Subordinated Debentures and the NGC Subordinated Redeemable Discount Debentures.

1.80 *"Existing NGC Debt Securities Record Date"* means the Effective Date or such other date determined by the Bankruptcy Court.

1.81 *"Existing NGC Indenture(s)"* means any one or more of the trust indentures pursuant to which the Existing NGC Debt Securities were issued.

1.82 *"Existing NGC Indenture Trustee(s)"* means any one or more of the trustees appointed under the Existing NGC Indentures.

1.83 *"Existing NGC Securities"* means, collectively the Existing NGC Common Stock and the Existing NGC Debt Securities.

1.84 *"Final Order"* means an order or judgment of a court, the implementation or operation or effect of which has not been stayed and as to which order or judgment (or any revision, modification or amendment thereof) the time to appeal or seek review or rehearing or writ of certiorari has expired and as to which no appeal or petition for review or hearing or certiorari has been taken or is pending; provided, however, that, pursuant to Section 6.7 of this Plan, any order or judgment allowing, disallowing or estimating a Claim which is not a Final Order as of the Effective Date solely because of a Person's right to move for reconsideration of such order or judgment pursuant to sections 502(e)(2) and/or 502(j) of the Bankruptcy Code and Bankruptcy Rule 3008 shall nevertheless become (and be deemed to be) a Final Order on the Effective Date.

1.85 *"Fund Administrators"* means the three (3) Persons to be appointed pursuant to Section 5.1(n) of this Plan and approved by the Bankruptcy Court, on or before the Effective Date, for the purpose of performing the duties and carrying out the obligations of trustees of the NGC Asbestos Settlement Fund in accordance with the terms and conditions contained in the NGC Asbestos Settlement Fund Documents and this Plan.

1.86 *"Fund Advisory Committee(s)"* means the BI Fund Advisory Committee and the PD Fund Advisory Committee (or either of them).

1.87 *"GECC"* means General Electric Capital Corporation, a New York corporation.

1.88 *"GECC DIP Loan"* means that certain revolving credit facility of up to $105 million, provided by GECC, as lender, to NGC, as borrower, pursuant to that certain Debtor in Possession Loan Agreement, dated as of October 29, 1990, as amended or modified from time to time.

1.89 *"Governmental Unit(s)"* means any one or more federal, state or local governmental entity, agency, department or bureau having jurisdiction of the Debtors or their assets and properties.

1.90 *"Initial Asset Valuation"* means the aggregate value of the Valuation Assets as of the Initial Asset Valuation Date, which value for purposes of this Plan shall be deemed to be an amount between $525 million and $575 million.

1.91 *"Initial Asset Valuation Date"* means December 31, 1992.

1.92 *"Insurance Company"* means any insurance company or insurance broker providing Insurance Coverage to NGC or its Subsidiaries, other than Austin or any Austin Subsidiary, for liability arising from or related to Asbestos Claims.

1.93 *"Insurance Coverage"* means the casualty or liability insurance coverage, not reduced to settlement proceeds, available with respect to Asbestos Claims and/or Asbestos Fund Expenses under: (a) any Insurance Policy or (b) any Asbestos Insurance Settlement Agreement.

1.94 *"Insurance Debtor Action Recoveries"* means the rights of NGC to any and all proceeds or other relief, exclusive of Asbestos Insurance Debtor Action Recoveries, from: (a) any award, judgment, relief, or other determination entered or made as to any Insurance Debtor Action; (b) any and all amounts payable by a Settling Insurance Company under any Insurance Settlement Agreement; and (c) any and all proceeds of any Insurance Policy paid or payable to Claimants.

1.95 *"Insurance Debtor Actions"* means all claims, causes of action and enforceable rights of NGC against any Insurance Company, exclusive of Asbestos Insurance Debtor Actions, arising from or related to: (a) any such Insurance Company's failure to provide Insurance Coverage under any Insurance Policy; (b) the refusal of any Insurance Company to compromise and settle any claim pursuant to any such

Insurance Policy; or (c) the interpretation or enforcement of the terms of any such Insurance Policy.

1.96 *"Insurance Policy"* means any general liability or property damage insurance policy naming NGC (or any predecessor or Subsidiary), as an insured in effect on or before the Confirmation Date upon which any claim may be made with respect to any Asbestos Claim.

1.97 *"Insurance Settlement Agreement"* means: (a) any settlement agreement with a Settling Insurance Company; and (b) any other settlement and compromise agreement with respect to any Insurance Policy or relating to any claims against any Settling Insurance Company; provided, however, that Insurance Settlement Agreement does not include an Asbestos Insurance Settlement Agreement.

1.98 *"Intercompany Claim"* means any Claim held by: (a) a Debtor against the other Debtor or (b) an Affiliate or Subsidiary of a Debtor against either Debtor.

1.99 *"Interest"* means any equity interest in either Debtor represented by the Existing Aancor Common Stock or the Existing NGC Common Stock.

1.100 *"Interestholder"* means the holder of an Interest in either of the Debtors.

1.101 *"IRC"* means the Internal Revenue Code of 1986, as amended, and as set forth in Title 26 of the United States Code.

1.102 *"IRS"* means the Internal Revenue Service of the United States of America.

1.103 *"LBO"* means, collectively, the following transactions and other related actions and events: (a) that certain leveraged buyout transaction, in the form of a merger, whereby Aancor Acquiring Corp., a wholly-owned subsidiary of Aancor, was merged with and into NGC, which merger was consummated on April 29, 1986, and pursuant to which the NGC Subordinated Redeemable Discount Debentures and the NGC Senior Subordinated Debentures were issued and a certain bank revolving credit facility was entered into for the purpose of providing financing for such transaction and the acquisition of the then outstanding common stock of NGC; (b) the issuance in April of 1987 of the NGC Priority Senior Subordinated Notes and the execution of certain revolving bank loan agreements for the purpose of providing for the payment, in part, of the bank revolving credit facility described in clause (a) above; and (c) all other loans transactions, stock acquisitions, and other actions and events in any way related to the negotiation, consummation or financing of the transactions described in clauses (a) and (b) above.

1.104 *"LBO Actions"* means all Debtor Actions which may arise from or in any way may relate to (or which may be alleged to have arisen from or relate to) the LBO (or any part thereof).

1.105 *"Legal Representative"* means Daniel M. Phillips, or his successor appointed by the Bankruptcy Court, by an Order entered April 14, 1992, to represent Unknown Asbestos Claimants.

1.106 *"Liberty Mutual"* means Liberty Mutual Insurance Company and its successors and assigns.

1.107 *"Lien"* means, with respect to any asset or property of the Debtors, any mortgage, lien, pledge, charge, security interest, encumbrance, or other security device of any kind affecting such asset or property.

1.108 *"Merger"* means the merger of Aancor with and into NGC pursuant to Section 5.2(a) of this Plan.

1.109 *"New Austin Directors"* means the board of directors of Austin elected, from time to time, pursuant to the Austin Corporate Documents, including, without limitation, the initial board of directors to be appointed as of the Effective Date pursuant to Section 5.5 of this Plan.

1.110 *"New NGC"* means a Delaware corporation to be formed pursuant to this Plan, and which shall do business from and after the Effective Date as "National Gypsum Company".

1.111 *"New NGC Common Stock"* means 50 million shares of common stock of New NGC, $.01 par value, to be authorized pursuant to the New NGC Corporate Documents, of which stock, approximately 20 million shares shall be issued by New NGC on the Effective Date and distributed to certain Claimants holding Allowed Claims pursuant to this Plan. Assuming the conversion of the New NGC Warrants into 2.234 million shares, there will exist 22.234 million shares of New NGC Common Stock. The voting powers and other rights with respect to this stock are summarized in Exhibit B of this Plan.

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1.112 *"New NGC Corporate Documents"* means the articles of incorporation and by laws of New NGC and all amendments thereto and all other related documents to be executed, delivered and filed with the appropriate governmental authorities by the Effective Date, under this Plan, the Plan Documents and applicable state law, which are necessary or appropriate to: (a) evidence the formation of New NGC; (b) authorize the Assets Sale; (c) authorize the issuance of the New NGC Securities; and (d) reflect the other requirements of this Plan, the Plan Documents and applicable state law.

1.113 *"New NGC Directors"* means the board of directors of NGC elected, from time to time, pursuant to the New NGC Corporate Documents, including, without limitation, the initial board of directors to be appointed as of the Effective Date pursuant to Section 5.3 of this Plan.

1.114 *"New NGC Operating Cash Fund"* means the Cash, which will not be less than $10 million, to be transferred on or before the Effective Date by NGC to New NGC for working capital and other purposes contemplated by this Plan, including all registration costs related to the New NGC Securities, as part of the NGC Sale Assets.

1.115 *"New NGC Registration Rights Agreement"* means an agreement regarding the registration and related rights of the holders of the New NGC Securities, the terms and conditions of which agreement are summarized in Exhibit C to this Plan, which agreement shall be substantially in the form set forth in the Plan Documents.

1.116 *"New NGC Securities"* means any one or more of the New NGC Common Stock, the New NGC Senior Notes, and the New NGC Warrants.

1.117 *"New NGC Senior Note Indenture"* means a trust indenture between New NGC and the New NGC Senior Note Indenture Trustee, to be dated as of the Effective Date, containing the terms and conditions that are necessary or appropriate to effect the issuance and governance of the New NGC Senior Notes, which trust indenture shall be substantially in the form set forth in the Plan Documents.

1.118 *"New NGC Senior Note Indenture Trustee"* means the Person (and such Person's successor) selected by NGC before Confirmation to serve as trustee under the New NGC Senior Note Indenture.

1.119 *"New NGC Senior Notes"* means the unsecured senior notes of New NGC, due on the tenth (10th) anniversary of the Effective Date, which notes, in the aggregate, shall have a stated principal amount of $100 million, to be issued by New NGC on the Effective Date under the New NGC Senior Note Indenture and this Plan on the terms and conditions which are summarized in *Exhibit D* to this Plan, which notes shall be subordinated in right of payment *only* to the Working Capital Loan.

1.120 *"New NGC Warrant Agent"* means the Persons elected as a warrant agent by New NGC on or before the Effective Date pursuant to the New NGC Warrant Agreement.

1.121 *"New NGC Warrant Agreement"* means that certain warrant agreement between New NGC and the New NGC Warrant Agent, to be executed as of the Effective Date, regarding the issuance of the New NGC Warrants, which warrant agreement shall be substantially in the form set forth in the Plan Documents.

1.122 *"New NGC Warrant Shares"* means 2.234 million shares of the New NGC Common Stock which may be purchased by the holders of the New NGC Warrants pursuant to the New NGC Warrant Agreement and this Plan.

1.123 *"New NGC Warrants"* means 2.234 million New NGC warrants, which entitle the holders thereof for each warrant so held to purchase one of the New NGC Warrant Shares for a purchase price of $14.50 per share, which warrants are to be issued by New NGC on the Effective Date pursuant to the New NGC Warrant Agreement and this Plan on the terms and conditions which are summarized in **Exhibit E** to this Plan.

1.124 *"NGC"* means National Gypsum Company, a Delaware corporation, a Debtor and Debtor in Possession in Reorganization Case No. 390-37213-SAF/11.

1.125 *"NGC Administrative Claim"* means any Administrative Claim against NGC including: (a) any Claim of NGC entitled to priority status predicated upon a seller's statutory or common law right to reclaim goods sold and delivered to NGC before the Petition Date to NGC, in the ordinary course of said seller's business, without regard to the solvency of NGC at the time of such sale, provided that

such seller has complied with section 546(c)(2) of the Bankruptcy Code; and (b) any NGC Current Obligations outstanding as of the Effective Date.

1.126 *"NGC Administrative Convenience Claim"* means any NGC Class 3 Unsecured Claim against NGC.

1.127 *"NGC Asbestos Claims Resolution Procedures"* means those certain National Gypsum Company Asbestos Disease and Property Damage Claims Resolution Procedures attached as Exhibit A to this Plan.

1.128 *"NGC Asbestos Settlement Fund"* means a trust or other entity to be established pursuant to the NGC Asbestos Settlement Fund Documents for the purpose of resolving (or directing the resolution of) all Asbestos Claims and holding, managing and maximizing the NGC Asbestos Settlement Fund Assets for use in resolving the Asbestos Claims. The NGC Asbestos Settlement Fund shall be a "designated settlement fund" or a "qualified settlement fund" pursuant to section 468B of the IRC and the proposed regulations issued by the IRS pursuant to said section 468B.

1.129 *"NGC Asbestos Settlement Fund Assets"* means: (a) the Asbestos Insurance Debtor Action Recoveries; (b) the Reorganized NGC Assets, as well as the income, profits, and proceeds, if any, derived from, or related to, any sale or liquidation of the Reorganized NGC Assets; (c) the Reorganized NGC Common Stock; *provided, however*, that legal ownership of the Reorganized NGC Common Stock shall be held by the Reorganized NGC Securities Trust; (d) the Retained Debtor Action Recoveries, if any; (e) the

proceeds of the Asbestos Fund Expenses Commitment; and (f) the income, dividends, profits, and proceeds, if any, derived from, or related to, the assets, properties and rights described in clauses (a) through (e) hereof.

1.130 *"NGC Asbestos Settlement Fund Documents"* means the trust agreement, articles of incorporation or other documents governing the creation and operation of the NGC Asbestos Settlement Fund, to be dated as of the Effective Date, which shall be substantially in the form set forth in the Plan Documents, as they may be amended or modified from time to time.

1.131 *"NGC Class Allocation(s)"* means any one (1) or more of the NGC Class 4A, 4B, 5, 6, 7, and 8 Allocations.

1.132 *"NGC Class 4A Allocation"* means: (a) $12,713,107.00 of the principal amount of the New NGC Senior Notes; and (b) 2,022,573 shares of the New NGC Common Stock, as such allocation may be adjusted pursuant to Section 4.3(d)(7)(C) of this Plan.

1.133 *"NGC Class 4B Allocation"* means: (a) $152,925.00 of the principal amount of the New NGC Senior Notes; (b) 30,585 shares of the New NGC Common Stock; and (c) 3,416 of the New NGC Warrants, as such allocation may be adjusted pursuant to **Section 4.3(d)(7)(C)** of this Plan.

1.134 *"NGC Class 5 Allocation"* means: (a) 85,070,902.00 of the principal amount of the New NGC Senior Notes; and (b) 13,534,229 shares of the New NGC

Common Stock, as such allocation may be adjusted pursuant to Section 4.3(d)(7)(C) of this Plan.

1.135 *"NGC Class 6 Allocation"* means 4,000,000 shares of the New NGC Common Stock, as such allocation may be adjusted pursuant to Section 4.3(d)(7)(C) of this Plan.

1.136 *"NGC Class 7 Allocation"* means 2,184,495 of the New NGC Warrants, as such allocation may be adjusted pursuant to Section 4.3(d)(7)(C) of this Plan.

1.137 *"NGC Class 8 Allocation"* means: (a) $2,063,066.00 of the principal amount of the New NGC Senior Notes; (b) 412,613 shares of the New NGC Common Stock; and (c) 46,089 of the New NGC Warrants, as such allocation may be adjusted pursuant to Section 4.3(d)(7)(C) of this Plan.

1.138 *"NGC Corporate Documents"* means: (a) the amendments to the articles of incorporation and bylaws of NGC and (b) the other related documents to be executed, delivered and filed with the appropriate governmental authorities under this Plan, the Plan Documents and applicable state law by the Effective Date, which are necessary or appropriate for the implementation of this Plan, including, without limitation, the authorization and issuance of the Reorganized NGC Common Stock.

1.139 *"NGC Current Obligations"* means: (a) all accounts payable and other liabilities or obligations of NGC which arose or accrued in the ordinary course of NGC's business during its Reorganization Case (excluding interest,

penalties, costs, assessments, or other charges incurred or accruing during such Reorganization Case on any Claim which arose before the Petition Date and excluding the obligations of NGC to GECC with regard to the GECC DIP Loan); (b) any taxes which became or become legally due and payable by NGC subsequent to the Petition Date and during NGC's Reorganization Case; and (c) the costs, fees and expenses to which an Existing NGC Indenture Trustee is entitled under applicable law or the Existing NGC Indenture to which it is a party, provided that the Class consisting of the NGC Debt Securities Claims arising from (or related to) the Existing NGC Debt Securities issued under such Existing NGC Indenture approves this Plan.

1.140 *"NGC Debt Securities Claim"* means any Unsecured Claim against NGC held by a Claimant with respect to any of the Existing NGC Debt Securities.

1.141 *"NGC Employee Benefit Plans"* means all pension, medical, surgical, hospital, dental, health care, bonus, incentive compensation, retirement, savings, and other benefit plans or arrangements for the benefit of the directors, officers and employees (both active and retired) of NGC, which plans and arrangements are all more specifically described in the Plan Documents.

1.142 *"NGC Environmental Claim"* means any Claim, exclusive of Asbestos Claims, asserted by any Governmental Unit or other Person against NGC and any of its Affiliates (excluding Austin and its subsidiaries) arising out of, or related to, any applicable Environmental Law, including, without limitation, any Claim: (a) to restrict or enjoin or

recover costs and expenses to remedy environmental pollution, contamination, or nuisance or to require NGC or any of its Affiliates to remedy or to incur costs to remedy environmental pollution, contamination or nuisance; (b) to remedy, reimburse, compensate or pay any penalty, fine or forfeiture for, or to restrict or enjoin, any violation of or alleged violation of any Environmental Law; (c) to pay any contractual Claim with respect to any Environmental Law; or (d) to reimburse any Person for personal injury (including worker's compensation, sickness, disease, or death) or tangible or intangible property damage arising out of, or relating to, any pollution or contamination contemplated in *clauses (a) through (c)* above, including any Contribution Claim with respect to such costs and expenses asserted by any Person.

1.143 *"NGC General Claims Classes"* means any one or more of NGC Classes 4A, 4B, 5, 6, 7, and 8.

1.144 *"NGC General Unsecured Claim"* means any Unsecured Claim against NGC other than a NGC Administrative Convenience Claim, NGC Environmental Claim, NGC Debt Security Claim or an Asbestos Claim and which is classified in NGC Classes 4A or 4B pursuant to this Plan.

1.145 *"NGC Other General Unsecured Claim"* means any NGC General Unsecured Claim which does not have senior status in respect to the Unsecured Claims in any of the other NGC General Claims Classes or any other Class of NGC Claims by reason of being the beneficiary of NGC Senior Rights and which Claim is classified in NGC Class 4B in this Plan.

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1.146 *"NGC Other Priority Claim"* means any Other Priority Claim against NGC.

1.147 *"NGC Priority Senior Subordinated Notes"* means the 11-3/8% Priority Senior Subordinated Notes due March 31, 1997, issued by NGC under the Indenture, dated as of April 1, 1987, between NGC and Continental National Bank and Trust Company of Chicago, as trustee.

1.148 *"NGC Priority Tax Claim"* means any Priority Tax Claim against NGC.

1.149 *"NGC Sale Assets"* means all of those assets, property interests, and effects (real and personal, tangible and intangible) including, without limitation, the New NGC Operating Cash Fund, NGC's Debtor Actions and Insurance Debtor Actions, all of NGC's rights, titles and interests in and to the Binning's Option, and all of NGC's, interest as a shareholder in all active and inactive subsidiaries of NGC (other than Austin and its subsidiaries), to be sold, transferred, assigned, and delivered to New NGC under the Assets Purchase Agreement and this Plan, as more fully described in the Assets Purchase Agreement, exclusive, however, of: (a) the Retained Debtor Actions; (b) the Reorganized NGC Assets; (c) the assets in the Reorganized NGC Securities Trust; and (d) the NGC Asbestos Settlement Fund Assets.

1.150 *"NGC Secured Claim"* means any Secured Claim against NGC.

1.151 *"NGC Senior General Unsecured Claim"* means any NGC General Unsecured Claim which has the benefit

of NGC Senior Rights and which Claim is classified in NGC Class 4A pursuant to this Plan.

1.152 *"NGC Senior Rightholder"* means a Claimant holding an Allowed Claim in NGC Class 4A, 5 or 6, who, by reason of any of the Existing NGC Indentures, is the beneficiary of any of the NGC Senior Rights created therein.

1.153 *"NGC Senior Rights"* means the contractual subordination rights and remedies created by the Existing NGC Indentures (including, without limitation, the right to recover post-petition interest, where and if applicable, from the distributions to be made to those NGC Classes which are subordinate in status and priority to the Claimants asserting such rights) which are for the benefit of the holders of "senior debt" or "senior indebtedness" (as those terms are defined in the Existing NGC Indentures), as such rights and remedies may be interpreted and enforced by the Bankruptcy Court.

1.154 *"NGC Senior Subordinated Debentures"* means the 14.5% Senior Subordinated Debentures due April 29, 2001, issued by NGC under the Indenture, dated as of April 29, 1986, between NGC and Chemical Bank, as trustee.

1.155 *"NGC Subordinated Redeemable Discount Debentures"* means the Subordinated Redeemable Discount Debentures due June 30, 2004, issued by NGC under the Indenture, dated as of April 29, 1986, between NGC and Manufacturers Hanover Trust Company, as trustee.

1.156 *"Non-Debtor Released Parties"* shall have the meaning ascribed to such term in Section 6.8(c) of this Plan.

1.157 *"Official Committees"* means the Asbestos Committee and the Trade and Bond Committee (or either of them).

1.158 *"Order"* means an order or judgment of the Bankruptcy Court.

1.159 *"Other Priority Claim"* means any Claim against either of the Debtors (other than an Administrative Claim or a Priority Tax Claim) to the extent such Claim is entitled to a priority in payment under section 507(a) of the Bankruptcy Code.

1.160 *"PD Claims Resolution Guidelines"* means those certain guidelines for the Asbestos Property Damage Claims Resolution Facility contained in the NGC Asbestos Claims Resolution Procedures.

1.161 *"PD Fund Advisory Committee"* means a committee, consisting of three (3) members to be appointed pursuant to Section 5.1(o)(2) of this Plan on or before the Effective Date, which shall be formed for the purpose of consulting with and advising the Fund Administrators regarding the administration of the NGC Asbestos Settlement Fund and the liquidation and resolution of Asbestos Property Damage Claims in accordance with the terms and conditions contained in this Plan and the NGC Asbestos Settlement Fund Documents.

1.162 *"Person(s)"* means any individual, firm, corporation, association, partnership, joint venture, trust, or other entity.

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1.163 *"Petition Date"* means October 28, 1990, the date on which the petitions for relief in the Reorganization Cases were filed by the Debtors in the Bankruptcy Court.

1.164 *"Plan"* means this First Amended and Restated Joint Plan of Reorganization dated as of September 4, 1992, for National Gypsum Company and Aancor Holdings, Inc., under chapter 11 of the Bankruptcy Code, including all exhibits hereto, as it may be amended or modified from time to time.

1.165 *"Plan Documents"* means all other documents and exhibits (including the Plan Securities Documents), as the same may be amended, modified, supplemented, or restated from time to time, that aid in effectuating this Plan, which documents and exhibits shall be filed by the Debtors with the Bankruptcy Court on or before the Plan Documents Filing Date.

1.166 *"Plan Documents Filing Date"* means a date for the filing of the Plan Documents which shall be either: (a) a date, as determined by the Debtors, that is as soon as practicable, but that in *no event is later* than twenty (20) calendar days before the commencement of the Confirmation Hearing or (b) such other date (or dates) determined by the Bankruptcy Court.

1.167 *"Plan Documents Review Center"* means the offices of the Debtors located at 2501 Cedar Springs, Suite 700, Dallas, Texas 75201-1433, at which any party in interest may review all of the Plan Documents once such Plan Documents are filed.

1.168 *"Plan Securities"* means any one or more of the New NGC Securities, the Existing Austin Common Stock and the Reorganized NGC Common Stock.

1.169 *"Plan Securities Document(s)"* mean any one or more of the New NGC Senior Note Indenture, the New NGC Warrant Agreement, the New NGC Registration Rights Agreement, and the Reorganized NGC Securities Trug:\dms\sincar\02252\01480\ld9x02_.docst Agreement.

1.170 *"Priority Tax Claim"* means any Claim against either of the Debtors to the extent that such Claim is entitled to a priority in payment under section 507(a)(7) of the Bankruptcy Code.

1.171 *"Pro Rata"* or *"Pro Rata Share(s)"* means the same proportion an Allowed Claim or an Allowed Interest in a particular Class bears to the aggregate amount of all Allowed Claims or the aggregate number of all Allowed Interests in such Class.

1.172 *"Proof of Claim"* or *"Proof of Interest"* means any proof of claim or proof of interest filed in the Bankruptcy Court pursuant to Bankruptcy Rules 3001 and 3002.

1.173 *"Released Parties"* shall have the meaning ascribed to such term in **Section 6.8(a)** of this Plan.

1.174 *"Releasors"* shall have the meaning ascribed to such term in **Section 6.8(a)** of this Plan.

1.175 *"Reorganization Case(s)"* means the above-captioned chapter 11 cases for the Debtors (or either of them).

1.176 *"Reorganized NGC"* means NGC, on and after the Effective Date, which entity shall be (and the Confirmation Order shall so provide) the successor to NGC for all purposes.

1.177 *"Reorganized NGC Assets"* means all assets, property interests, and rights of Reorganized NGC, including the Insurance Policies, the Asbestos Insurance Debtor Actions, the Retained Debtor Actions, and the Existing Austin Common Stock (*exclusive, however*, of the NGC Sale Assets, and all other assets and properties which may be vested in New NGC, from time to time, after the Effective Date), together with the income, dividends, and proceeds, if any, derived from the assets, properties, interests, and rights vested in Reorganized NGC.

1.178 *"Reorganized NGC Common Stock"* means 1,000 shares of common stock of Reorganized NGC, $.01 par value, to be authorized and issued on the Effective Date, pursuant to the NGC Corporate Documents and applicable state law, in the amounts and manner set forth in this Plan, to the Reorganized NGC Securities Trust.

1.179 *"Reorganized NGC Securities Trust"* means that certain trust to be created as of the Effective Date, pursuant to the Reorganized NGC Securities Trust Agreement, for the purpose of holding the legal title to, and voting of, the Reorganized NGC Common Stock for the benefit of the Claimants holding Asbestos Claims.

1.180 *"Reorganized NGC Securities Trust Agreement"* means that certain trust agreement, to be executed, as of the

Effective Date, by NGC, as grantor, and the Fund Administrators, as trustees, for the purpose of creating the Reorganized NGC Securities Trust, which trust agreement shall be substantially in the form set forth in the Plan Documents.

1.181 *"Retained Debtor Action Recoveries"* means the Debtor Action Recoveries, if any resulting from any of the Retained Debtor Actions.

1.182 *"Retained Debtor Actions"* means those Debtor Actions assertable against: (a) the law firm of Hoyle, Morris & Kerr (including, without limitation, the litigation relating to or arising from the motion to disqualify filed and prosecuted by the Asbestos Committee against Hoyle, Morris & Kerr) and (b) the R.J. Lee Group, which actions are to be retained and prosecuted by Reorganized NGC pursuant to this Plan.

1.183 *"Schedules"* means the Schedules, Statements and Lists filed by each of the Debtors with the Bankruptcy Court pursuant to Bankruptcy Rule 1007, as they may be amended or supplemented from time to time, pursuant to Bankruptcy Rule 1009.

1.184 *"SEC"* means the United States Securities and Exchange Commission.

1.185 *"Secured Claim"* means any Claim against either of the Debtors that is: (a) secured in whole or part, as of the Petition Date, by a Lien on any of the assets or property of either of the Debtors (exclusive of any Lien securing the

GECC DIP Loan), which Lien is valid, perfected and enforceable under applicable law and is not subject to avoidance under the Bankruptcy Code or applicable non-bankruptcy law, but only to the extent of the value of the assets or property securing any such Claim; or (b) Allowed under this Plan as a Secured Claim.

1.186 *"Settling Insurance Company"* means any Insurance Company which has entered into, or subsequently enters into, an Insurance Settlement Agreement or an Asbestos Insurance Settlement Agreement.

1.187 *"Stonewall Litigation"* means that certain cause of action styled *Stonewall Insurance Company v. National Gypsum Company et al.*, filed in the United States District Court for the Southern District of New York, Case No. 68 Civ. 967 (S.D.N.Y).

1.188 *"Subsequent Asset Valuation"* means the aggregate value of the Valuation Assets and the Retained Debtor Action Recoveries, as of the Subsequent Asset Valuation Date, as such value shall be determined by the Fund Administrators pursuant to the terms and conditions contained in **Section 5.1(l)** of this Plan.

1.189 *"Subsequent Asset Valuation Date"* means December 31, 1995 or as soon as practicable thereafter.

1.190 *"Subsidiary"* means any of those subsidiary corporations of the Debtors or Austin described in Section 2.5 of the Disclosure Statement.

1.191 *"Trade and Bond Committee"* means the Official Committee of Trade and Bond Creditors of National Gypsum Company appointed in the Reorganization Case of NGC by the United States Trustee.

1.192 *"Unknown Asbestos Disease Claim"* means any Asbestos Disease Claim of an Unknown Asbestos Disease Claimant.

1.193 *"Unknown Asbestos Disease Claimant"* means any individual who: (a) has been exposed to asbestos or asbestos-containing products of NGC prior to the Confirmation Date and whose identity is unknown to NGC and the Asbestos Committee; and (b) has not been exposed to asbestos or asbestos-containing products of NGC prior to the Confirmation Date but who will suffer such exposure at some point in the future.

1.194 *"Unsecured Claim"* means any Claim against either of the Debtors that is neither secured nor entitled to a priority under the Bankruptcy Code or the Orders of the Bankruptcy Court, including, without limitation: (a) any Claim arising from the rejection of an executory contract or unexpired lease under section 365 of the Bankruptcy Code; and (b) any portion of a Claim to the extent the value of the Claimant's interest in the applicable Estate's interest in the property securing such Claim is less than the amount of the Claim, or to the extent that the amount of the Claim subject to setoff is less than the amount of the Claim, as determined pursuant to Section 506(a) of the Bankruptcy Code.

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1.195 *"Valuation Assets"* means: (a) Austin; (b) the Insurance Coverage; (c) the Asbestos Fund Expenses Commitment; and (d) the Asbestos Insurance Debtor Action Recoveries.

1.196 *"Working Capital Lender"* means the bank or other financial institution providing the Working Capital Loan (and any successors or assigns), which initial lender will be selected by the Confirmation Date.

1.197 *"Working Capital Loan"* means that certain credit facility referenced in the Disclosure Statement, to be provided to New NGC by the Working Capital Lender pursuant to the Working Capital Loan Documents, which credit facility shall be comprised of: (a) a revolving credit facility and (b) a letter of credit facility, together with all amendments, extensions, modifications, renewals, replacements, and restatements of such credit facility.

1.198 *"Working Capital Loan Agreement"* means that certain loan agreement, to be entered into and dated as of the Effective Date, between New NGC and the Working Capital Lender, evidencing the Working Capital Loan, as the same may be, from time to time, amended, modified, extended, renewed, or restated, which loan agreement shall contain those terms and conditions contained in either: (a) the draft of such loan agreement or (b) the term sheet or comment letter which shall be filed with the Bankruptcy Court before the Confirmation Hearing.

1.199 *"Working Capital Loan Documents"* means the Working Capital Loan Agreement and all other agreements,

notes, and instruments to be executed by New NGC and delivered to the Working Capital Lender to evidence and secure the Working Capital Loan, together with all amendments, extensions, modifications, renewals, replacements, and restatements thereof.

ARTICLE II

CLASSIFICATION OF CLAIMS AND INTERESTS

2.1 *Classification.*

(a) *General.* **Section 2.2** hereof sets forth a designation of Classes of Claims and Interests. A Claim or Interest is classified in a particular Class only to the extent that the Claim or Interest qualifies within the description of the Class and is classified in a different Class to the extent the Claim or Interest qualifies within the description of that different Class.

(b) *Unclassified Claims.* In accordance with section 1123(a)(1) of the Bankruptcy Code, Aancor Administrative Claims, NGC Administrative Claims, Aancor Priority Tax Claims, and NGC Priority Tax Claims have not been classified and are excluded from the Classes established in **Section 2.2** hereof.

2.2 *Classes.* For the purposes of this Plan, those Persons holding Claims against, or Interests in, the Debtors are grouped in the following Classes in accordance with section 1122(a) of the Bankruptcy Code:

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(a) *Aancor Claims and Interests.* The following constitute the Classes of Aancor Claims and Interests:

(1) *Aancor Class 1 – Aancor Other Priority Claims.* Aancor Class 1 consists of all Aancor Other Priority Claims.

(2) *Aancor Class 2 – Aancor Secured Claims.* Aancor Class 2 consists of all Aancor Secured Claims.

(3) *Aancor Class 3 – Aancor General Unsecured Claims.* Aancor Class 3 consists of all Aancor General Unsecured Claims.

(4) *Aancor Class 4 – Existing Aancor Common Stock.* Aancor Class 4 consists of all Interests arising from (or related to) the Existing Aancor Common Stock.

(b) *NGC Claims and Interests.* The following constitute the Classes of NGC Claims and Interests:

(1) *NGC Class 1 – NGC Other Priority Claims.* NGC Class 1 consists of all NGC Other Priority Claims.

(2) *NGC Class 2 – NGC Secured Claims.* NGC Class 2 consists of all NGC Secured Claims.

(3) *NGC Class 3 – NGC Administrative Convenience Claims.* NGC Class 3 consists of: (A) all NGC General Unsecured Claims, in an amount *equal to or less than* $3,500.00, that would be classified as either a NGC Class 4A or 4B Claim under this Plan if such Claims *exceeded*

$3,500.00; and (B) all NGC General Unsecured Claims that would otherwise be classified as either NGC Class 4A or 4B Claims *except* that the Claimants holding such Claims have voluntarily elected to reduce such Claims to $3,500.00 by the date on which ballots accepting or rejecting this Plan must be returned, as fixed by the Bankruptcy Court; *provided, however*, that: (1) only Claimants holding NGC General Unsecured Claims otherwise included in either NGC Class 4A or 4B may elect to reduce their respective Claims to qualify for NGC Class 3; and (2) any Claimant who fails to make such election by returning a ballot appropriately marked within such time shall be deemed not to have made such election and shall become, and shall be treated for all purposes under this Plan as, a member of either NGC Class 4A or 4B, as the case may be.

(4) *NGC Class 4-A – NGC Senior General Unsecured Claims*. NGC Class 4A consists of all NGC Senior General Unsecured Claims other than those NGC Senior General Unsecured Claims provided for in NGC Class 3 above.

(5) *NGC Class 4B – NGC Other General Unsecured Claims*. NGC Class 4B consists of all NGC Other General Unsecured Claims other than those NGC Other General Unsecured Claims provided for in NGC Class 3 above.

(6) *NGC Class 5 – NGC Priority Senior Subordinated Notes*. NGC Class 5 consists of all NGC Debt Securities Claims arising from (or related to) the NGC Priority Senior Subordinated Notes.

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(7) *NGC Class 6 – NGC Senior Subordinated Debentures.* NGC Class 6 consists of all NGC Debt Securities Claims arising from (or related to) the NGC Senior Subordinated Debentures.

(8) *NGC Class 7 – NGC Subordinated Redeemable Discount Debentures.* NGC Class 7 consists of all NGC Debt Securities Claims arising from (or related to) the NGC Subordinated Redeemable Discount Debentures.

(9) *NGC Class 8 – NGC Environmental Claims.* NGC Class 8 consists of all NGC Environmental Claims.

(10) *NGC Class 9 – Asbestos Disease Claims.* NGC Class 9 consists of all Asbestos Disease Claims.

(11) *NGC Class 10 – Asbestos Property Damage Claims.* NGC Class 10 consists of all Asbestos Damage Claims.

(12) *NGC Class 11 – NGC Intercompany Claims.* NGC Class 11 consists of all Unsecured Claims against NGC that are Intercompany Claims.

(13) *NGC Class 12 – Existing NGC Common Stock Interest.* NGC Class 12 consists of the Interest arising from (or related to) the Existing NGC Common Stock.

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ARTICLE III

IMPAIRMENT OF CLAIMS AND INTERESTS

3.1 *Impaired Classes.* Aancor Classes 3 and 4, and NGC Classes 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, and 12 are under this Plan. The Debtors are seeking acceptances of this Plan by Claimants in Aancor Classes 3 and 4 and NGC Classes 3, 4A, 4B, 5, 6, 7, 8, 9, and 10. The Debtors are not seeking acceptances of this Plan from the Claimants holding Intercompany Claims in NGC Class 11 or from the Interestholder holding the Interest in NGC Class 12. The Claimants holding Intercompany Claims in NGC Class 11 and the Interestholder holding the Interest in NGC Class 12 will not receive any distribution under this Plan. Therefore, the Claimants holding Intercompany Claims in NGC Class 11 and the Interestholder holding the Interest in NGC Class 12 will be deemed to have rejected this Plan pursuant to section 1126(g) of the Bankruptcy Code.

3.2 *Unimpaired Classes.* Aancor Classes 1 and 2 and NGC Classes 1 and 2 are unimpaired under this Plan. Therefore, Aancor Classes I and 2 and NGC Classes 1 and 2 shall be deemed to have accepted this Plan under the provisions of section 1126(f) of the Bankruptcy Code and the Debtors will not solicit acceptances of this Plan from Claimants holding such Claims.

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ARTICLE IV

PROVISIONS FOR SATISFACTION OF CLAIMS AND INTERESTS

The allowed Claims and Allowed Interests, as classified in **Article II** hereof, shall be satisfied in the manner set forth in this **Article IV**. The treatment of, and the consideration to be received by, Claimants and Interestholders holding Allowed Claims and Allowed Interests pursuant to this Plan shall be in full settlement, release and discharge of their respective Allowed Claims and Allowed Interests.

4.1 *Administrative Claims and Priority Tax Claims.*

(a) *Aancor Administrative Claims and NGC Administrative Claims.* The Allowed Aancor Administrative Claims and the Allowed NGC Administrative Claims, to the extent not previously paid during the Reorganization Cases, shall be paid either (1) in full, in Cash, on the Distribution Date by the Debtor liable therefor or (2) upon such other terms as may be agreed to in writing by such Claimant and the Debtor liable therefor; *provided*, that any current trade or other payables incurred after the Petition Date by a Debtor in the ordinary course of its business and not otherwise assumed by New NGC as part of the NGC Current Obligations under the Assets Sale shall be paid by, or on behalf of, such Debtor in full, in Cash, in the ordinary course of its business.

(b) *Aancor Priority Tax Claims and NGC Priority Tax Claims.* The Allowed Aancor Priority Tax Claims and the

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Allowed NGC Priority Tax Claims shall be paid by the Debtor liable therefor, in the sole discretion of such Debtor, either (1) in full, in Cash, on the Distribution Date or (2) pursuant to the provisions of section 1129(a)(9)(C) of the Bankruptcy Code, in equal annual installments commencing on the first (1st) anniversary of the Distribution Date with a final payment of the remaining unpaid portion thereof to be made on the sixth (6th) anniversary of the date of the assessment of such tax, together with interest on the unpaid portion of each such Priority Tax Claim from and after the Distribution Date until the date of final payment at an interest rate equal to the six (6) month United States Treasury Bill rate which is in effect as of the Effective Date (or such other interest rate as the Bankruptcy Court may approve); provided, however, that the Debtors shall have the right to pay any Allowed Priority Tax Claim, or any remaining unpaid balance of such Claim, in full, at any time on or after the Effective Date, without premium or penalty.

4.2 *Aancor Claims and Interests.* The following constitutes the treatment under this Plan of the Aancor Claims and Interests:

(a) *Aancor Class 1 – Aancor Other Priority Claims.* All Allowed Aancor Other Priority Claims (1) shall be paid in full, in Cash, on the Distribution Date or (2) shall receive such other treatment as may be agreed to in writing by such Claimant and Aancor.

(b) *Aancor Class 2 – Aancor Secured Claims.* Each Aancor Class 2 Claimant shall bear any costs and expenses recoverable under section 506(c) of the Bankruptcy Code

and shall retain, unaltered, the legal, equitable and contractual rights, including, without limitation, the Liens that secure such Allowed Aancor Secured Claim, to which such Allowed Aancor Secured Claim entitles such Claimant; provided, however, that each Claimant holding an Allowed Aancor Secured Claim may only exercise such rights and remedies with respect to the assets and property that secure such Allowed Aancor Secured Claim, without recourse of any kind against either of the Debtors or their respective Estates. Any Allowed Claim based on any deficiency claimed by an Aancor Class 2 Claimant shall become, and shall be treated for all purposes under this Plan, as an Allowed Aancor General Unsecured Claim and shall be classified herein as an Aancor Class 3 Claim.

(c) *Aancor Class 3 – Aancor General Unsecured Claims.* As soon as practicable after the Effective Date, New NGC, on behalf of Aancor, shall liquidate and convert to Cash all unencumbered assets, claims, and property of the Estate of Aancor not previously liquidated or otherwise disposed of. Each Claimant holding an Allowed Aancor General Unsecured Claim in Aancor Class 3 shall receive its Pro Rata Share of all Cash and other assets (less the amount set aside pursuant to **Section 4.2(d)** of this Plan for Aancor Class 4) remaining after the payment or satisfaction in full (or the escrow of amounts sufficient for such payments) of all Allowed Aancor Administrative Claims, Allowed Aancor Priority Tax Claims and Allowed Aancor Other Priority Claims. All Aancor General Unsecured Claims and Allowed Aancor Interests shall be satisfied solely from the unencumbered assets and property of the Estate of Aancor.

(d) *Aancor Class 4 – Existing Aancor Common Stock.* On the Distribution Date, all shares of the Existing Aancor Common Stock will be cancelled and extinguished pursuant to this Plan. Each Interestholder holding an Allowed Aancor Interest will be paid, in Cash, on the Distribution Date, its Pro Rata Share of the sum of $1 million; *provided, however*, that if Aancor Class 3 fails to accept this Plan, Aancor Interestholders shall be permitted to receive or retain property distributable under this Plan only to the extent this Plan may be confirmed under section 1129(b) of the Bankruptcy Code.

4.3 *NGC Claims and Interests.* The following constitutes the treatment under this Plan of the NGC Claims and Interests:

(a) *NGC Class 1 – NGC Other Priority Claims.* All Allowed NGC Other Priority Claims (1) shall be paid in full, in Cash, on the Distribution Date or (2) shall receive such other treatment as may be agreed to in writing by such Claimant and NGC.

(b) *NGC Class 2 – NGC Secured Claims.* Each NGC Class 2 Claimant shall bear any costs and expenses recoverable under section 506(c) of the Bankruptcy Code and shall retain, unaltered, the legal, equitable and contractual rights, including, without limitation, the Liens that secure such Allowed NGC Secured Claim, to which such Allowed NGC Secured Claim entitles such Claimant; *provided, however*, that each Claimant holding an Allowed NGC Secured Claim may only exercise such rights and remedies with respect to the assets and property that secure such Allowed NGC Secured Claim, without recourse of any kind

against either of the Debtors or their respective Estates. Any Allowed Claim based on any deficiency claimed by an NGC Class 2 Claimant shall become, and shall be treated for all purposes under this Plan as, an Allowed NGC General Unsecured Claim and shall be classified herein as a NGC Class 3, NGC Class 4A or NGC Class 4B Claim, depending on the Amount thereof and the applicability of NGC Senior Rights, if any, to such Claim.

(c) *NGC Class 3 – NGC Administrative Convenience Claims*. Each Claimant holding an Allowed NGC Administrative Convenience Claim shall be paid, in Cash, on the Distribution Date, an amount equal to 75% of the Allowed Amount of such Claimant's Allowed NGC Administrative Convenience Claim and the NGC Senior Rights, if any, of such Claimant shall be extinguished and cancelled. If the Claimants holding Allowed NGC Administrative Convenience Claims are found by the Bankruptcy Court, in accordance with section 1126(c) of the Bankruptcy Code, to have rejected this Plan, then the NGC Administrative Convenience Claims shall become, and shall be treated for all purposes under this Plan as, either NGC Class 4A or 4B Claims, as the case may be.

(d) *NGC General Claims Classes*. The following constitutes the treatment under this Plan of the NGC General Claims Classes:

(1) *NGC Class 4A – NGC Senior General Unsecured Claims*. Each Claimant holding an Allowed NGC Senior General Unsecured Claim in NGC Class 4A shall receive, on the Distribution Date, its Pro Rata Share of

(A) the NGC Class 4A Allocation (as such Allocation may be adjusted pursuant to **Section 4.3(d)(7)(C)** of this Plan), and (B) any subsequent distributions to Claimants in NGC Class 4A by reason of any adjustments that are required to be made to the Pro Rata Share of Claimants in NGC Class 4A pursuant to **Section 5.1(g)** of this Plan.

(2) *NGC Class 4B – NGC Other General Unsecured Claims*. Each Claimant holding an Allowed NGC Other General Unsecured Claim in NGC Class 4B shall receive, on the Distribution Date, its Pro Rata Share of (A) the NGC Class 4B Allocation and (B) any subsequent distributions to Claimants in NGC Class 4B by reason of any adjustments that are required to be made to the Pro Rata Share of Claimants in NGC Class 4B pursuant to **Section 5.12(g)** of this Plan.

(3) *NGC Class 5 – NGC Priority Senior Subordinated Notes*. Each Claimant holding an Allowed NGC Debt Securities Claim in NGC Class 5 shall receive, on the Distribution Date, its Pro Rata Share of (A) the NGC Class 5 Allocation (as such Allocation may be adjusted pursuant to **Section 4.3(d)(7)(C)** of this Plan), and (B) any subsequent distributions to Claimants in NGC Class 5 by reason of any adjustments that are required to be made to the Pro Rata Share of Claimants holding an Allowed Claim in NGC Class 5 pursuant to **Section 5.12(g)** of this Plan.

(4) *NGC Class 6 – NGC Senior Subordinated Debentures*. Each Claimant holding an Allowed NGC Debt Securities Claim in NGC Class 6 shall receive, on

the Distribution Date, its Pro Rata Share of (A) the NGC Class 6 Allocation (as such Allocation may be adjusted pursuant to **Section 4.3(d)(7)(C)** of this Plan), and (B) any subsequent distributions to Claimants in NGC Class 6 by reason of any adjustments that are required to be made to the Pro Rata Share of Claimants in NGC Class 6 pursuant to **Section 5.12(g)** of this Plan.

(5) *NGC Class 7 – NGC Subordinated Redeemable Discount Debentures*. Each Claimant holding an Allowed NGC Debt Securities Claim in NGC Class 7 shall receive, on the Distribution Date, its Pro Rata Share of (A) the NGC Class 7 Allocation (as such Allocation may be adjusted pursuant to **Section 4.3(d)(7)(C)** of this Plan), and (B) any subsequent distributions to Claimants in NGC Class 7 by reason of any adjustments i that are required to be made to the Pro Rata Share of Claimants in NGC Class 7 pursuant to **Section 5.12(g)** of this Plan.

(6) *NGC Class 8 – NGC Environmental Claims*. Each Claimant holding an Allowed NGC Environmental Claim in NGC Class 8 shall receive, on the Distribution Date, its Pro Rata Share of (A) the NGC Class 8 Allocation and (B) any subsequent distributions to Claimants in NGC Class 8 by reason of any adjustments that are required to be made to the Pro Rata Share of Claimants in NGC Class 8 pursuant to **Section 5.12(g)** of this Plan.

Appendix A

(7) *Application, Settlement and Release of the NGC Senior Rights in NGC General Claims Classes.*

(A) *Application of NGC Senior Rights in NGC Classes 4A, 5, 6, and 7.*

(i) *NGC Classes 4A, 5, and 6.* The classification and manner of satisfying Allowed Claims in NGC Classes 4A, 5, 6, and 7 set forth in this Plan take into consideration the NGC Senior Rights of the Claimants holding Allowed Claims in NGC Classes 4A, 5, and 6. Before the application and enforcement of the NGC Senior Rights of NGC Senior Rightholders in NGC Classes 4A, 5, and 6 as contemplated by this Plan, the potential recovery under this Plan for Claimants holding Allowed Claims in NGC Classes 4A, 4B, 5, 6, 7, and 8 would be equal in value. Provided that NGC Classes 4A, 5, and 6 each accept this Plan, the Claimants in the following NGC General Claims Classes whose Claims are Allowed shall receive distributions pursuant to this Plan which will provide such Claimants with the following estimated recoveries in regard to their Allowed Claims, which recoveries represent a sharing by the NGC Senior Rightholders in such NGC Classes of the distributions which they would otherwise be entitled to receive by reason of a strict application and enforcement of their respective NGC Senior Rights with those NGC Classes who are contractually subordinate in status and priority to such NGC Senior Rightholders:

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NGC Class	Estimated Recovery
NGC Class 4A8	86.1%
NGC Class 5	86.1%
NGC Class 6	26.5%

(ii) *NGC Classes 4B and 8.* The estimated recoveries under this Plan for NGC Classes 4B and 8 are as follows:

NGC Class	Estimated Recovery
NGC Class 4B	32.1%
NGC Class 8	32.1%

(iii) *NGC Class 7.* No recoveries have been estimated for NGC Class 7 because the value of the New NGC Warrants which comprise the NGC 7 Allocation (as well as parts of the NGC Class 4B and NGC Class 8 Allocations) is speculative in nature. Due to the high degree of uncertainty of the potential range within which the New NGC Warrants may trade, the Debtors cannot assure or guarantee what the trading price range for the New NGC Warrants will be in the future.

(iv) *Release of NGC Senior Rights.* If this Plan is accepted by NGC Classes 4A, 5, and 6, then, on the Effective Date, all NGC Senior Rights that the NGC Senior Rightholders in such NGC Classes may have shall be released, and

all actions related to the enforcement of such NGC Senior Rights shall be permanently enjoined. Accordingly, distributions to Claimants holding Allowed Claims in NGC Classes 4A, 5, 6, and 7 shall not be subject to further payments to any NGC Senior Rightholders in regard to such released NGC Senior Rights or to levy, garnishment, attachment or other legal process by any NGC Senior Rightholders in regard to such released NGC Senior Rights.

(B) *Settlement of NGC Senior Rights.* Pursuant to Bankruptcy Rule 9019 and in consideration for the distributions and other benefits provided under this Plan, the provisions of this **Section 4.3(d)(7)** shall constitute a good faith compromise and settlement of all claims or controversies relating to the release of all NGC Senior Rights that a NGC Senior Rightholder may have with respect to any Allowed Claim, or any distribution to be made pursuant to this Plan on account of such Claim. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such claims or controversies and the Bankruptcy Court's finding that such compromise or settlement is in the best interest of NGC and its Estate and Claimants, and is fair, equitable and reasonable.

(C) *Acceptance or Rejection of this Plan by NGC Class 4A, 5, 6, or 7.* If NGC Class 4A or 5 fails to accept this Plan, no Claimant in either of

such NGC Classes will be bound by the release specified in **Section 4.3(d)(7)(A)** hereof with respect to NGC Classes 6 and 7, and if NGC Classes 4A and 5 accept this Plan and NGC Class 6 fails to accept this Plan, no Claimant in NGC Class 6 will be bound by the release specified in **Section 4.3(d)(7)(A)** hereof with respect to NGC Class 7. In any of such events, the NGC Senior Rights of the NGC Senior Rightholders in NGC Classes 4A, 5, 6, and 7 shall be applied and enforced in the following manner:

(i) *Rejection of this Plan by NGC Class 6.* If NGC Class 4A and NGC Class 5 accept this Plan, but NGC Class 6 fails to accept this Plan as required by section 1129(a) of the Bankruptcy Code, this Plan shall be automatically amended to provide that: (aa) the NGC Class 6 Allocation shall include *only* 2,000,000 shares of the New NGC Common Stock; (bb) the New NGC Warrants which are included in the NGC Class 7 Allocation shall be eliminated; (cc) no distributions shall be made with respect to NGC Class 7 Claims; and (dd) the shares of New NGC Common Stock which are deducted from the NGC Class 6 Allocation shall be reallocated to the NGC Class 4A and 5 Allocations in such proportions as are necessary to preserve the relative equality of the recoveries under this Plan of Claimants holding Allowed Claims in NGC Classes 4A and 5.

(ii) *Confirmation of this Plan.* Upon the failure of either NGC Class 6 or NGC Class 7 to accept this Plan, the Debtors shall seek Confirmation of this Plan, as so amended, if applicable, pursuant to **Section 10.4** of this Plan.

(D) *Other Settlements.* To the extent that the NGC Senior Rightholders who are entitled to enforce their respective NGC Senior Rights either: (i) compromise or settle their respective NGC Senior Rights with the approval of the Bankruptcy Court or (ii) obtain an Order of the Bankruptcy Court requiring a different order of distributions in connection with such NGC Senior Rights, the distributions to NGC Classes 4A, 5, 6, and 7 under this Plan will incorporate and implement such compromises, settlements and Orders, and this Plan will be deemed to be modified so as to give effect to such compromises, settlements or Orders.

(E) *No Effect on NGC Classes 4B, 8, 9, and 10 by Reason of the Application of NGC Senior Rights.* The distributions under this Plan to Claimants holding Allowed Claims in NGC Classes 4B, 8, 9, and 10 will not be affected by the application, enforcement, and settlement of the NGC Senior Rights of Claimants in NGC Classes 4A, 5, 6, and 7 pursuant to this **Section 4.3(d)(7)**.

(e) *NGC Class 9 – Asbestos Disease Claims.* Each Asbestos Disease Claim shall be liquidated and resolved through the Asbestos Disease Claims Resolution Facility and

satisfied from the Asbestos Disease Sharing Allocation. No amount shall be paid to any NGC Class 9 Claimant for punitive damages, penalties, or interest (except for interest to be paid pursuant to **Section 5.1(f)(1)** of this Plan) with respect to any Allowed Asbestos Disease Claim.

(f) *NGC Class 10 – Asbestos Property Damage Claims.* Each Allowed Asbestos Property Damage Claim shall be liquidated and resolved through the Asbestos Property Damage Claims Resolution Facility and satisfied from the Asbestos Property Damage Sharing Allocation. No amount shall be paid to any NGC Class 10 Claimant for punitive damages, penalties, or interest (except for interest to be paid pursuant to **Sections 5.1(f)(1)** and **5.1(k)(3)** of this Plan) with respect to any Asbestos Property Damage Claim.

(g) *NGC Class 11 – NGC Intercompany Claims.* No distributions shall be made under this Plan with respect to NGC Intercompany Claims, if any, and on the Effective Date, all such Intercompany Claims against NGC, if any, will be cancelled and extinguished pursuant to this Plan.

(h) *NGC Class 12 – Existing NGC Common Stock.* The Interestholder of the shares of the Existing NGC Common Stock shall receive no distributions under this Plan, and on the Effective Date, all shares of the Existing NGC Common Stock will be cancelled and extinguished pursuant to this Plan.

Appendix A

ARTICLE V

MEANS FOR EXECUTION OF PLAN

5.1 *NGC Asbestos Settlement Fund and Asbestos Claims Resolution Facilities.*

(a) *Creation of NGC Asbestos Settlement Fund.* On the Effective Date, the NGC Asbestos Settlement Fund will be created and established in accordance with the NGC Asbestos Settlement Fund Documents. The NGC Asbestos Settlement Fund will be a *"designated settlement fund"* or a *"qualified settlement fund"* within the meaning of section 468B of the IRC and the proposed regulations issued by the IRS pursuant to said section 468B.

(b) *Purposes of NGC Asbestos Settlement Fund.* The purposes of the NGC Asbestos Settlement Fund will be to: (1) direct the resolution of all Asbestos Claims through the respective Asbestos Claims Resolution Facility as cost effectively as possible, taking into consideration both short- and long-term indemnity and defense costs and (2) hold, manage, and maximize the NGC Asbestos Settlement Fund Assets for use in satisfying the Asbestos Claims.

(c) *Transfers of NGC Asbestos Settlement Fund Assets.* On the Effective Date, or as soon thereafter as practicable, NGC will transfer and assign (or cause to be transferred and assigned) to the NGC Asbestos Settlement Fund all of NGC's rights, titles, and interests in and to all Cash assets which are part of the NGC Asbestos Settlement Fund Assets, free and clear of all liens, claims, and encumbrances. NGC will

transfer and assign (or cause to be transferred and assigned) to the NGC Asbestos Settlement Fund all of NGC's rights, titles, and interests in and to the non-Cash assets which are a part of the NGC Asbestos Settlement Fund Assets, free and clear of all liens, claims, and encumbrances, on the Effective Date or as soon as practicable thereafter.

(d) *Extinguishment of Claims by NGC Asbestos Settlement Fund.* Pursuant to the Confirmation Order, establishment of the NGC Asbestos Settlement Fund (and future compliance with the terms set forth in the NGC Asbestos Settlement Fund Documents and the Confirmation Order) shall extinguish all Asbestos Claims, including Asbestos Claims against Affiliates and Subsidiaries (other than Austin or any subsidiaries of Austin), and the liability therefor shall be satisfied solely from the NGC Asbestos Settlement Fund Assets, and, other than NGC's obligation to establish and make payments to the NGC Asbestos Settlement Fund, as provided in this Plan, the Debtors, their respective Affiliates and Subsidiaries, Reorganized NGC, and New NGC shall not have any further financial or other responsibility for Asbestos Claims or for Asbestos Fund Expenses; *except* New NGC's obligations to fund and pay the Asbestos Fund Expenses Commitment. Asbestos Claims shall be liquidated through the applicable Asbestos Claims Resolution Facility.

(e) *Excess NGC Asbestos Settlement Fund Assets.* Any excess NGC Asbestos Settlement Fund Assets which had been allocated to, and made a part of, either of the Asbestos Sharing Allocations pursuant to this Plan shall be subject to reallocation upon the occurrence of the conditions set forth

in **Section 5.1(k)(4)** of this Plan. To the extent there are any NGC Asbestos Settlement Fund Assets remaining after the payment of all Allowed Asbestos Claims and the payment, in full, of all the Asbestos Fund Expenses, such excess NGC Asbestos Settlement Fund Assets shall be transferred to such charitable purposes as the Fund Administrators, in their reasonable discretion, shall determine, which charitable purposes, if practicable, shall be related to the treatment of, research regarding, or payment of claims related to, asbestos-caused disorders.

(f) *Expenses of NGC Asbestos Settlement Fund.*

(1) The Asbestos Fund Expenses Commitment shall be payable as follows: (a) $5 million to be paid to the NGC Asbestos Settlement Fund on the Effective Date; *provided, however*, if NGC's participation in the CCR is, or will be, terminated before the Effective Date, the Asbestos Committee or the Legal Representative may apply to the Bankruptcy Court for an Order permitting NGC to advance, before the Effective Date, up to $2 million to be used, as necessary, to establish or implement the Alternate Asbestos Disease Claims Resolution Facility and the NGC Asbestos Settlement Fund and any such amount so advanced shall be deducted from the $5 million payable by NGC on the Effective Date; and (b) the balance of such sum shall be paid to the NGC Asbestos Settlement Fund over a period not to exceed twenty-four (24) months from the Effective Date. Such payment or payments shall include the interest which accrues from the Effective Date on the amount paid, calculated at a rate equal to the average three (3)

month certificate of deposit rate as published in the Wall Street Journal.

(2) The Fund Administrators shall pay all Asbestos Fund Expenses from the NGC Asbestos Settlement Fund Assets and the Asbestos Fund Expenses Commitment. Neither NGC nor New NGC shall have any obligation to pay any Asbestos Fund Expenses; *except* NGC's and New NGC's obligations to fund and pay the Asbestos Fund Expenses Commitment.

(3) The initial payment of the Asbestos Fund Expenses Commitment shall be reduced by all litigation costs and expenses *in excess of* $250,000.00 paid or accrued by NGC through the Effective Date in the prosecution of any of the Retained Debtor Actions as hereinafter provided.

(g) *Allocation of Retained Debtor Actions.* New NGC shall be entitled to receive from the NGC Asbestos Settlement Fund: (1) reimbursement of the litigation costs and expenses (including professional fees) *in excess of* $250,000.00 paid or accrued by the Estate of NGC in the prosecution of any of the Retained Debtor Actions through the Effective Date; *plus* (2) Retained Debtor Action Recoveries (net of professional fees and court costs) up to the sum of the fair market value of the Plan Securities and the amount of any Cash, if any, required to be distributed under this Plan to the defendants in such Retained Debtor Actions in discharge of the Allowed Amounts of any Claims acquired by such defendants as a consequence of the payment of any of the Retained Debtor Action Recoveries; *plus* (3) all

gross proceeds *in excess* of $300,000.00 recovered in respect of the Retained Debtor Actions asserted against the R.J. Lee Group. If the deficit between the gross proceeds of the Retained Debtor Action Recoveries and the litigation costs and expenses paid by the Estate of NGC in connection therewith does not exceed $500,000.00, the obligations of the NGC Asbestos Settlement Fund to reimburse New NGC for such excess litigation costs and expenses paid by the Estate of NGC shall be *reduced* by half (1/2) such deficit up to $250,000.00.

(h) *Costs of CCR.* Before the Effective Date, NGC, for its own account, shall pay all monthly expenses associated with NGC's continued membership in the CCR which are not otherwise payable from the proceeds of Insurance Coverage for Asbestos Claims. After the Effective Date, all monthly expenses associated with NGC's continued membership in the CCR shall be the responsibility of Reorganized NGC and the NGC Asbestos Settlement Fund.

(i) *Holding and Voting of Reorganized NGC Common Stock.* The Reorganized NGC Common Stock will be issued to, and legal title thereto held by, the Reorganized NGC Securities Trust. The Fund Administrators shall serve as the trustees of the Reorganized NGC Securities Trust, and, in such capacity, the Fund Administrators shall be authorized to vote the shares of Reorganized NGC Common Stock on all appropriate issues under the NGC Corporate Documents and applicable state law. Upon the sale of the Reorganized NGC Common Stock or the liquidation of Reorganized NGC, the consideration, if any, payable to the shareholders of the Reorganized NGC Common Stock as a result of any such

transaction shall be distributed by the Fund Administrators to the applicable Claimants holding Asbestos Claims in the same manner as distributions are made to such Claimants pursuant to the NGC Asbestos Settlement Fund Documents and this Plan.

(j) *Discharge of Debtors' Liabilities to Asbestos Claimants.* The distribution of the NGC Asbestos Settlement Fund Assets to the NGC Asbestos Settlement Fund pursuant to this Plan shall (and the Confirmation Order shall so provide) extinguish all liabilities of the Debtors to the Claimants holding Asbestos Claims.

(k) *Determination of Asbestos Sharing Allocations.* For purposes of this Plan, the Asbestos Sharing Allocations shall be determined and approved and, where applicable, adjusted in the manner set forth below:

(1) The NGC Asbestos Settlement Fund Assets shall be allocated to, and made a part of, the Asbestos Disease Sharing Allocation, *except* NGC Asbestos Settlement Fund Assets specifically allocated to the Asbestos Property Damage Sharing Allocation. Subject to adjustment as hereinafter provided, the Base Property Damage Allocation *plus* the net proceeds of the Asbestos Insurance Debtor Action Recoveries against Liberty Mutual for bad faith claims attributable to Asbestos Property Damage Claims shall be allocated to, and made a part of, the Asbestos Property Damage Sharing Allocation.

(2) If the Subsequent Asset Valuation, as determined by the Fund Administrators on the Subsequent Asset

Valuation Date, *exceeds* $600 million, the Base Property Damage Allocation shall be *increased* by 20% of such excess up to a maximum increase of $25 million. If the Subsequent Asset Valuation as so determined is *less* than $500 million, the Base Property Damage Allocation shall be *reduced* by 20% of such difference, not to exceed a maximum reduction of $25 million. As so adjusted, the Base Property Damage Allocation shall be a maximum of $162.5 million or a minimum of $112.5 million.

(3) Beginning on January 1, 1993, and continuing until such date as all Allowed Asbestos Property Damage Claims are satisfied pursuant to the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, an additional amount *equal to* the simple interest which accrues at the rate of 3% *per annum* on the undistributed amount of the Base Property Damage Allocation, as adjusted during such period, shall be allocated to, and made a part of, the Asbestos Property Damage Sharing Allocation.

(4) After payment of all Asbestos Property Damage Claims, any excess NGC Asbestos Settlement Fund Assets allocated to the Asbestos Property Damage Sharing Allocation shall be reallocated to, and be made a part of, the Asbestos Disease Sharing Allocation, *provided* there are Asbestos Disease Claims then remaining unsatisfied. After all Asbestos Disease Claims are satisfied pursuant to the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, any excess NGC Asbestos Settlement Fund Assets allocated to the Asbestos Disease Sharing Allocation shall be

reallocated to, and made a part of, the Asbestos Property Damage Sharing Allocation, *provided* there are Asbestos Property Damage Claims then remaining unsatisfied.

(l) *Determination of Subsequent Asset Valuation.* On the Subsequent Asset Valuation Date, the Fund Administrators shall determine the Subsequent Asset Valuation. In determining the Subsequent Asset Valuation, the Fund Administrators shall consider the values of the Valuation Assets that existed as of December 31, 1992 and the Retained Debtor Action Recoveries, except that the value of the payments made by any Insurance Company to the CCR from September 30 through December 31, 1992, shall be added to the value of the Valuation Assets for the purpose of the Subsequent Asset Valuation; *provided, however*, that the Subsequent Asset Valuation shall exclude the Asbestos Insurance Debtor Action Recoveries against Liberty Mutual described in **Section 5.1(k)(1)** of this Plan. To make the Subsequent Asset Valuation comparable to the Initial Asset Valuation in terms of the time value of money, the Subsequent Asset Valuation will take into consideration reductions in the values of the Valuation Assets and the Retained Debtor Action Recoveries due to Cash expenditures or liabilities incurred by the NGC Asbestos Settlement Fund and Reorganized NGC subsequent to September 30, 1992, and not otherwise reflected in the Initial Asset Valuation.

(m) *Implementation of Asbestos Claims Resolution Facilities.*

(1) *General.* At Confirmation of this Plan, the Bankruptcy Court shall issue such Orders (which Orders

may be included as part of the Confirmation Order) as it deems necessary to authorize the implementation of the respective Asbestos Claims Resolution Facilities.

(2) *Continuation of CCR; Alternate Asbestos Disease Claims Resolution Facility.* With regard to the Asbestos Disease Claims, the CCR shall function, from and after the Effective Date, as the *"Asbestos Disease Claims Resolution Facility"* pursuant to this Plan unless: (A) the Bankruptcy Court terminates NGC's membership in the CCR, (B) the Legal Representative moves for, and the Bankruptcy Court approves, such termination, based on the Legal Representative's reasonable determination, after monitoring the costs of Claims processed by the CCR and the potential for Unknown Asbestos Disease Claims and consulting with Asbestos Disease Claims representatives on the Asbestos Committee, that the cost of resolving those Asbestos Disease Claims paid, or to be paid, after September 15, 1992, *exceeds or will exceed* equivalent treatment of all Asbestos Disease Claims by more than the dislocation cost of terminating the CCR, which costs, for purposes of this Plan, are presumed to be $10 million; *provided that* such termination shall not become effective until such excess has been paid, (C) the CCR is terminated, (D) Reorganized NGC's membership in the CCR is terminated by the CCR, or (E) the Fund Administrators, pursuant to their authority under the NGC Asbestos Settlement Fund Documents and after consultation with the BI Fund Advisory Committee, elect to terminate Reorganized NGC's membership in the CCR. Upon the occurrence of any of the events described in *clauses (A)*

through (E) of this **Section 5.1(m)(2)**, the Alternate Asbestos Disease Claims Resolution Facility will become the *"Asbestos Disease Claims Resolution Facility"* pursuant to this Plan. The Debtors, however, subject to the approval of the Asbestos Committee and the Legal Representative (or, if applicable, the Fund Administrators), reserve the right to move the Bankruptcy Court, pursuant to section 1127 of the Bankruptcy Code, to make such amendments to the Alternate Asbestos Disease Claims Resolution Facility as may be necessary to conform such facility to any objections thereto that the Bankruptcy Court may sustain in the course of the Confirmation of this Plan. In determining the dislocation cost associated with the termination of the membership of NGC or Reorganized NGC, as the case may be, in the CCR, the Legal Representative shall take into account all the value added to the NGC Asbestos Settlement Fund by remaining with the CCR, including, without limitation, reduced transaction costs, knowledge and experience in processing and resolving Asbestos Disease Claims, bargaining power in the relationship with insurance carriers, reducing exposure for Contribution Claims, national negotiations for methods of processing Unknown Asbestos Disease Claims, and other benefits of being a member of a critical mass of defendants.

(n) *Appointment of the Fund Administrators*. The three (3) initial Fund Administrators will be appointed, at Confirmation, by the Bankruptcy Court upon the unanimous recommendation of the co-chairmen of the Asbestos Committee and the Legal Representative. Each such Fund

Administrator shall serve until the *earlier of* such Person's death, resignation, or removal. All successor Fund Administrators shall be appointed in accordance with the terms and conditions contained in the NGC Asbestos Settlement Fund Documents and approved by the Bankruptcy Court after due notice and hearing. For purposes of performing their duties and fulfilling their obligations under the NGC Asbestos Settlement Fund Documents and this Plan, each Fund Administrator shall be deemed to be (and the Confirmation Order shall so provide) a *"party in interest"* within the meaning of section 1109(b) of the Bankruptcy Code.

(o) *Fund Advisory Committees.* On or before the Effective Date, the members of the Fund Advisory Committees shall be selected pursuant to the following procedures:

(1) *BI Fund Advisory Committee.* Two (2) of the three (3) initial members of the BI Fund Advisory Committee will be selected by the co-chairman of the Asbestos Committee representing Claimants holding Asbestos Disease Claims and one (1) such member will be selected by the Legal Representative.

(2) *PD Fund Advisory Committee.* The three (3) initial members of the PD Fund Advisory Committee will be selected by the co-chairman of the Asbestos Committee representing Claimants holding Asbestos Property Damage Claims.

(3) *Successor Committee Members.* Each member of the respective Fund Advisory Committees shall serve until the *earlier of* such Person's death, resignation or

removal. All successor committee members shall be selected in accordance with the terms and conditions contained in the NGC Asbestos Settlement Fund Documents.

5.2 *Merger of Aancor into NGC.*

(a) *Merger.* The Confirmation Order shall authorize the Merger of Aancor with and into NGC on the Effective Date, and, thereafter, Reorganized NGC will be the surviving corporation. To effect the Merger, Aancor and NGC shall take such actions as shall be required by their corporate charters and by-laws and by the applicable laws in the jurisdiction in which they were incorporated.

(b) *Filing of Aancor Corporate Merger Documents.* On or before the Effective Date, NGC and Aancor shall each adopt and file with the appropriate official in the jurisdiction of incorporation and jurisdictions in which they are qualified to do business, such certificates and other documents as shall be necessary or appropriate to effectuate the Merger of Aancor into NGC pursuant to this Plan.

(c) *Termination of Aancor Stock Purchase Agreements.* On the date of the Merger, each of the Aancor Stock Purchase Agreements shall be deemed to be terminated in accordance with their respective terms for all purposes and all obligations and rights thereunder shall be deemed to be extinguished and cancelled.

(d) *Assumption of Plan Obligations by New NGC.* Upon consummation of the Merger and this Plan, New NGC shall

perform all of the obligations of the Debtors under this Plan (except for the obligations regarding the Asbestos Claims which shall be the sole responsibility of the NGC Asbestos Settlement Fund), including the administration of all payments with respect to Allowed Claims against and Interests in Aancor in accordance with this Plan; *provided, however*, that all Allowed Claims against and Interests in Aancor shall be paid solely from the assets and properties of Aancor and New NGC shall be responsible only to act as a Disbursing Agent in distributing such assets and properties to Claimants holding Allowed Claims against and Interestholders holding Allowed Interests in Aancor.

5.3 *New NGC.*

(a) *Creation of New NGC.* On the Effective Date, New NGC will be formed as a Delaware corporation pursuant to the New NGC Corporate Documents.

(b) *Purpose of New NGC.* The primary purpose of New NGC is to acquire, hold and manage the NGC Sale Assets and to continue the basic business activities and operations of Gold Bond and any other lawful business activity.

(c) *Closing of the Assets Sale.* On the Effective Date, the Assets Sale to New NGC will be closed in accordance with the terms and conditions of the Assets Purchase Agreement and the NGC Sale Assets will be transferred to New NGC free and clear of all claims, liens, and encumbrances other than the Liens on these assets which constitute a part of the NGC Sale Assets and which are the collateral for any of the NGC Secured Claims.

(d) *Assumption of NGC Current Obligations.* On the Effective Date, New NGC, as part of the consideration for the Assets Sale, will assume all of NGC's obligations to pay and perform the then outstanding NGC Current Obligations.

(e) *Distribution of New NGC Securities.* On the Distribution Date, each of the New NGC Securities will be issued as a *"certificated security"* as the New NGC Directors deem appropriate and will be made available to the respective Disbursing Agents for distribution to the respective Claimants pursuant to the terms of the New NGC Corporate Documents, the applicable Plan Securities Documents and this Plan.

(f) *No Merger Liquidation or Disposition of New NGC.* New NGC shall not be liquidated, merged with any other corporation or otherwise disposed of, nor shall its assets be disposed of other than in the ordinary course of business, unless such merger, liquidation or disposition will not cause the Assets Sale and the distribution of the New NGC Securities as contemplated by this Plan to fail to qualify under section 368(a)(1)(G) (or any other applicable nonrecognition provision) of the IRC.

(g) *New Management of New NGC.*

(1) *New NGC Directors.* On the Effective Date, as provided for in the New NGC Corporate Documents, the board of directors of New NGC shall be comprised of seven (7) members. The majority holders of the NGC Priority Senior Subordinated Notes shall select four (4) of the initial New NGC Directors, the current management

of NGC shall select two (2) of the initial New NGC Directors and the holders of the NGC Senior Subordinated Debentures shall select one (1) of the initial New NGC Directors. The Persons who will initially serve as New NGC Directors, after the Effective Date and until the first meeting of the shareholders of New NGC, shall be approved by the Bankruptcy Court upon recommendation of the Debtors in accordance with the selection process described above. The New NGC Corporate Documents shall provide that the board of directors be divided into three (3) classes of New NGC Directors with the classes serving staggered three (3) year terms.

(2) *Officers of New NGC.* On the Effective Date, it is anticipated that the initial executive officers of New NGC and their respective offices will be as follows:

Officer	Position and Office
Peter C. Browning	Chairman, President and Chief Executive Officer
Edward A. Porter	Senior Vice President – Administration, General Counsel and Secretary
Gerard P. Carroll	Senior Vice President – Manufacturing Operations and Engineering

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Autino O. Maraia	Senior Vice President – Sales and Marketing
Allan V. Cecil	Vice President – Public Affairs
Cynthia A. Hartley	Vice President – Human Resources
Robert M. Prokay	Treasurer

Additionally, New NGC shall be entitled, pursuant to the New NGC Corporate Documents, to appoint such other corporate officers as it may deem necessary or appropriate from time to time and to employ such officers upon such terms and conditions as the New NGC Directors may approve.

(3) *Officers' Compensation.* The officers described above shall continue to receive the same compensation and benefits, including routine salary increases, as they have received during the NGC Reorganization Case until the New NGC Directors adopt other compensation and benefit arrangements for such officers. The New NGC Corporate Documents will authorize New NGC, acting through the New NGC Directors, to enter into such employment, retirement, indemnification, and other agreements with the key executive officers and New NGC Directors as the New NGC Directors, in the exercise of their corporate duty and in accordance with applicable state law, deem appropriate and to adopt such bonus and other key executive incentive plans as are appropriate for key executives of companies similar to New NGC.

(4) *Directors' Compensation.* After the Effective Date, New NGC will be authorized, pursuant to the New NGC Corporate Documents, to compensate the New NGC Directors under a plan, which shall provide for the payment of annual director's fees and meeting fees to nonemployee New NGC Directors and reimbursement to all New NGC Directors for their expenses incurred in attending meetings of the New NGC Directors. It is anticipated that New NGC will, from time to time, enhance the compensation and benefits plan for nonemployee New NGC Directors.

5.4 *Reorganized NGC.*

(a) *Purposes of Reorganized NGC.* The primary purposes of Reorganized NGC will be: (1) to hold and manage the Reorganized NGC Assets; (2) to remit to the NGC Asbestos Settlement Fund the net profits, if any, attributable to the Reorganized NGC Assets; (3) to prosecute the Asbestos Insurance Debtor Actions and the Retained Debtor Actions; (4) to remit to the NGC Asbestos Settlement Fund the Asbestos Insurance Debtor Action Recoveries; (5) to liquidate, when economically desirable, the Reorganized NGC Assets and remit the proceeds thereof to the NGC Asbestos Settlement Fund; and (6) subject to the provisions of **Section 5.1(m)(2)** of this Plan, to continue or terminate the membership of Reorganized NGC in the CCR in accordance with the terms and conditions of the NGC Asbestos Settlement Fund Documents and this Plan.

(b) *New Management of Reorganized NGC.* Reorganized NGC will have a three (3) to nine (9) member board of

directors. The Persons who will initially serve, after the Effective Date, as the officers and directors of Reorganized NGC shall be approved by the Bankruptcy Court, upon the recommendation of the Asbestos Committee and the Legal Representative at Confirmation, or, if the Asbestos Committee and the Legal Representative fail to make such a recommendation, upon the recommendation of the Debtors. The initial terms and conditions of employment of Reorganized NGC's management will be approved by the Bankruptcy Court upon the recommendation of the Asbestos Committee and the Legal Representative, or, if the Asbestos Committee and the Legal Representative fail to make such recommendation, upon the recommendation of the Debtors. Thereafter, the board of directors of Reorganized NGC will be authorized to deal with such matters.

(c) *Asbestos Insurance Debtor Actions*. After the Effective Date, the conduct of the Asbestos Insurance Debtor Actions shall be the responsibility of Reorganized NGC.

(d) *NGC Corporate Documents*. On or before the Effective Date, the articles of incorporation and bylaws of NGC will be amended in accordance with the NGC Corporate Documents and applicable state law. The NGC Corporate Documents shall, among other matters, provide: (1) for the Merger of Aancor with and into NGC, with NGC as the surviving corporation; (2) for the authorization of the issuance of the Reorganized NGC Common Stock; (3) that Reorganized NGC shall be prohibited pursuant to section 1123(a)(6) of the Bankruptcy Code from issuing non-voting equity securities; (4) for the change of the name of Reorganized NGC from *"National Gypsum Company"* to

"Asbestos Claims Management Corporation" (or such other name as the Asbestos Committee may select); and (5) for the satisfaction of the other terms and provisions of this Plan which are required to be reflected therein.

(e) *Creation of the Reorganized NGC Securities Trust.* On the Effective Date, the Reorganized NGC Securities Trust will be created in accordance with the Reorganized NGC Securities Trust Agreement, and the Reorganized NGC Common Stock will be transferred thereto.

5.5 *Austin Restructuring.*

(a) *Austin Corporate Documents.* On or before the Effective Date, the articles of incorporation and bylaws of Austin will be amended, where necessary, to reflect the corporate restructurings and other applicable provisions of this Plan in accordance with the Austin Corporate Documents and applicable state law.

(b) *New Management of Austin.* Austin will have a three (3) to nine (9) member board of directors. Between the Confirmation Date and the Effective Date, the board of directors of Austin shall include two (2) members designated by the Asbestos Committee and approved by the Bankruptcy Court. The Persons who will initially serve, after the Effective Date, as the New Austin Directors and the officers of Austin shall be selected by the board of directors of Reorganized NGC. The initial terms and conditions of employment of Austin's management will be determined by the board of directors of Reorganized NGC subject to the approval of the Bankruptcy Court. Thereafter, the New Austin Directors shall be authorized to deal with such matters.

5.6 *Cancellation of the Existing NGC Securities.* On the Effective Date, the Existing NGC Securities (and the rights of the Claimants and the Interestholder therein) shall be deemed to be terminated, cancelled, and extinguished, and the Confirmation Order shall provide therefor.

5.7 *Cancellation of the Existing Aancor Common Stock.* On the Effective Date, the Existing Aancor Common Stock (and the rights of the Interestholders therein) shall be deemed to be terminated, cancelled, and extinguished, and the Confirmation Order shall provide therefor.

5.8 *Voting Securities.* The NGC Corporate Documents, the Austin Corporate Documents and the New NGC Corporate Documents shall all include the restrictions of section 1123(a)(6) of the Bankruptcy Code, including a provision that no non-voting equity securities will be issued by New NGC, Reorganized NGC or Austin, before Consummation of this Plan.

5.9 *Qualification of the New NGC Senior Note Indenture.* On or before the Effective Date and the issuance of the New NGC Senior Notes, the New NGC Senior Note Indenture will be qualified under the Trust Indenture Act of 1939, as amended, and the rules and regulations thereunder.

5.10 *Provisions Concerning Plan Distributions.*

(a) *Disbursing Agents.* The Debtors, or such Disbursing Agent (or Agents) as the Debtors may, in their sole discretion, employ, shall make all distributions and deliveries required under this Plan. In the case of Aancor, the Disbursing Agent may be New NGC if Aancor so elects.

(b) *Date of Distributions.* Distributions by the Debtors shall be made on the Distribution Date unless otherwise provided for herein or as may be ordered by the Bankruptcy Court. Distributions to be made by the Debtors on the Distribution Date shall be deemed made on the Distribution Date if made either (1) on the Distribution Date or (2) as soon as practical thereafter, *but in no event later* than ten (10) calendar days after the Distribution Date, *except* as otherwise provided for herein, or *except* as may be ordered by the Bankruptcy Court.

(c) *Surrender of the Existing NGC Debt Securities and Existing Aancor Common Stock.* As a condition to the receipt by any Claimant or Interestholder holding an Allowed Claim or Interest against or in either of the Debtors of any distribution under this Plan, such Claimant or Interestholder must surrender to the Disbursing Agent the Existing NGC Debt Securities or Existing Aancor Common Stock, if any, giving rise to such Claimant's or Interestholder's Allowed Claim or Allowed Interest, and the Disbursing Agent shall mark the Existing NGC Debt Securities or Existing Aancor Common Stock so surrendered as "cancelled" or "paid". In the event of any lost or destroyed Existing NGC Securities or Existing Aancor Common Stock, the holder thereof must deliver an affidavit of loss or destruction to the Disbursing Agent, as well as an agreement to indemnify the Debtors, Reorganized NGC, New NGC, and the Disbursing Agent, in form and substance reasonably acceptable to the Debtors, Reorganized NGC, New NGC, and the Disbursing Agent, including, if requested, an appropriate bond, in order to receive any distribution under this Plan.

(d) *Unsurrendered Existing NGC Debt Securities and Existing Aancor Common Stock.* Two (2) years after the Effective Date, any Claimant or Interestholder holding an Allowed Claim against NGC or Interest in Aancor who has not surrendered such Claimant's or Interestholder's Existing NGC Debt Securities or Existing Aancor Common Stock, as the case may be, as set forth in **Section 5.1(c)** of this Plan, to the extent permitted by law, will forfeit such Claimant's or Interestholder's right to receive any distribution under this Plan.

(e) *De Minimis and Fractional Amounts of Plan Securities.* The Plan Securities shall be distributed only in whole units. No fractional shares of the New NGC Common Stock or the Reorganized NGC Common Stock or interests in the New NGC Warrants shall be distributed to the Claimants holding Allowed Claims against NGC. No New NGC Senior Notes will be distributed in integral multiples of *less* than $1,000.00 to Claimants holding Allowed Claims against NGC. Each time a distribution of the Plan Securities is to be made under this Plan to a Claimant holding an Allowed Claim against NGC, all fractional shares of any such Plan Securities, or New NGC Senior Notes in principal amounts of *less* than $1,000.00, as the case may be, that would otherwise have been distributed to such Claimants, shall be aggregated in a separate pool for the Claimants holding such Allowed Claims in such Claimants' Class. Claimants holding Allowed Claims against NGC who would otherwise be entitled to receive fractional shares of any of the Plan Securities or the New NGC Senior Notes in principal amounts of *less* than $1,000.00, as the case may be, shall be ranked within each Class according to the size of the

fractional share in such Plan Securities or the principal amount of such New NGC Senior Note to which such Claimant would otherwise be entitled. If two or more such Claimants are entitled to the same fractional share or principal amount (as rounded to the sixth decimal place), the ranking of such Claimant shall be determined by lot. Based on such ranking within each Class, a whole share of any of the Plan Securities, a whole New NGC Warrant, or a New NGC Senior Note in the principal amount of $1,000.00, as the case may be, shall be distributed, on a Class-by-Class basis from the pool with respect to such Class, to those Claimants entitled to the largest fractions of each such security in each such Class until all the shares of, or interests in, the Plan Securities, and the entire principal amount of the New NGC Senior Notes shall have been distributed pursuant to this Plan. Notwithstanding anything to the contrary contained in this **Section 5.10(e)**, New NGC may, at its sole election, settle any such fractional interest in Cash.

(f) *Payment of Existing NGC Indenture Trustees' Fees and Expenses*. The Existing NGC Indenture Trustees may apply to the Bankruptcy Court, pursuant to section 503(b) of the Bankruptcy Code, for reimbursement from NGC of their respective fees and expenses incurred, including those of their respective attorneys. Section 503(b) of the Bankruptcy Code permits such reimbursement to be made to the extent that an Existing NGC Indenture Trustee has made a *"substantial contribution"* to the NGC Reorganization Case. Because it is not possible to determine whether, or to what extent, the Bankruptcy Court will authorize such reimbursement, the distributions pursuant to this Plan to the respective holders of Existing NGC Debt Securities under

the Existing NGC Indentures may be diminished by the claims of the Existing NGC Indenture Trustees under the Existing NGC Indentures for such fees and expenses. Under the terms of certain of the Existing NGC Indentures, the respective Existing NGC Indenture Trustees may have a Lien on the New NGC Securities issued to the relevant NGC Class of Claims in respect of unpaid fees and expenses.

As provided in **Section 5.15** of this Plan, on the Effective Date, this Plan will operate to cancel all obligations of NGC under the Existing NGC Indentures; *however*, the rights of the Existing NGC Indenture Trustees to seek payment of their respective fees and expenses, as described above, will remain intact.

(g) *Existing NGC Debt Securities Record Date.* The Existing NGC Debt Securities Record Date shall be the date for determining the Claimants holding NGC Debt Securities Claims who are entitled to receive distributions pursuant to **Article IV** of this Plan. As of the close of business on the Existing NGC Debt Securities Record Date for purposes of distribution, the transfer ledgers in respect of the Existing NGC Debt Securities shall be closed. NGC, the Disbursing Agent (or Agents), and the respective Existing NGC Indenture Trustees or their respective agents shall have no obligation to recognize any transfer of Existing NGC Debt Securities occurring after the Existing NGC Debt Securities Record Date. The Disbursing Agent (or Agents) and the Existing NGC Indenture Trustees and their respective agents shall be entitled instead to recognize and deal for all purposes herein with only those holders of record stated on the respective transfer ledgers maintained by the Existing NGC

Indenture Trustees or their respective agents for the Existing NGC Debt Securities as of the close of business on the Existing NGC Debt Securities Record Date. On or before the Existing NGC Debt Securities Record Date, the Debtors shall take such actions as they deem necessary or appropriate to terminate the Debtors' status as a *"reporting company"* under the Exchange Act and to have the Existing NGC Debt Securities delisted on any securities exchange on which the Existing NGC Debt Securities (or any of them) are traded or sold.

5.11 *Transactions on Business Days.* If the Effective Date, or any other date on which a transaction may occur under this Plan, shall occur on a day that is not a Business Day, the transactions contemplated by this Plan to occur on such day shall occur instead on the next succeeding Business Day.

5.12 *Disputed Claims and Interests.*

(a) *Objection Deadline.* As soon as practicable, but in no event later than six (6) months after the entry of the Confirmation Order, unless otherwise ordered by the Bankruptcy Court, objections to Claims (other than Asbestos Claims) and Interests shall be filed with the Bankruptcy Court and served upon the Claimants and Interestholders holding such Claims and Interest to which objections are made and the United States Trustee.

(b) *Prosecution of Objections.* After the Effective Date, only New NGC, and, in the case of Asbestos Claims only, Reorganized NGC and the Fund Administrators, shall have

authority to file objections, litigate to judgment, settle, or withdraw objections to Disputed Claims and Disputed Interests. As of the Effective Date, New NGC, Reorganized NGC, and the Fund Administrators shall be entitled to compromise or settle any Disputed Claim or Disputed Interest without approval of the Bankruptcy Court.

(c) *Establishment of Disputed Claims Reserve.* Notwithstanding any other provision of this Plan, no assets or property, including, without limitation, the NGC Class Allocations, shall be distributed under this Plan on account of any Disputed Claim. For all Disputed Claims other than Asbestos Claims, New NGC shall establish and hold, in trust, reserves (each such reserve being herein called a *"Disputed Claims Reserve"*) with respect to each Class of Claims (including Claims against Aancor) in which there exists a Disputed Claim and place in each Disputed Claims Reserve the assets and property to be distributed on account of such Disputed Claims pursuant to **Article IV** hereof, to the extent such Disputed Claims become Allowed. Cash held in any Disputed Claims Reserve shall be held in a segregated interest-bearing trust account. To the extent practicable, New NGC may invest the Cash in any Disputed Claims Reserve in a manner that will yield a reasonable net return, taking into account the safety of the investment.

(d) *Determination of Disputed Claims Reserve.* The Debtors shall determine for each Class of Claims the amount of the respective NGC Class Allocation, and other assets and property sufficient to fund each Disputed Claims Reserve established with respect to any Class of Claims. Upon request of the Debtors, the Bankruptcy Court may estimate and

determine by an Estimation Order the Estimated Amount of Claims in each Class for which a Disputed Claims Reserve has been established. If either Debtor elects not to request such an Estimation Order from the Bankruptcy Court with respect to any Disputed Claim or Interest, the respective Debtor (or New NGC in the case of Aancor) will include within the applicable Disputed Claims Reserve, the amount the holder of such Disputed Claim or Interest would be entitled to receive under this Plan if such Claim or Interest was Allowed in the full amount asserted by such holder. Any Claimant holding a Disputed Claim so estimated will have recourse only to undistributed assets and property in the Disputed Claims Reserve for the Class in which such Disputed Claim has been placed and not to the Debtors, Reorganized NGC, New NGC, or Austin, should the Allowed Claim of such Claimant, as finally determined by a Final Order, exceed such Estimated Amount.

(e) *Distribution of Disputed Claims Reserve.* The assets and property in each Disputed Claims Reserve including the allocable portion of the net return yielded from the investment of any Cash in such Disputed Claims Reserve, if any, and all proceeds of interest payments, redemptions and regular and special dividends, if any, that would have been received by the holders of any of the Plan Securities that were held in each Disputed Claims Reserve, will be distributed by New NGC (including distributions on behalf of Aancor after the Merger) to Claimants holding Disputed Claims as such Claims become Allowed by Final Order.

(f) *Return of Assets.* Except as otherwise provided herein, all assets and properties (and all interest payments

and dividends previously paid in connection therewith) in any Disputed Claims Reserve for any Class of Claims remaining after the resolution of all disputes relating thereto shall be distributed ratably in accordance with the terms of this Plan to the then registered owners, holders or bearers of the various Plan Securities (exclusive of any Cash in any Disputed Claims Reserve not distributed to NGC Class 3) pursuant to this Plan. Any Cash in any Disputed Claims Reserve not distributed pursuant to this Plan will be returned to New NGC and will be used by New NGC, in such manner and amount as New NGC deems appropriate, to pay accumulated regular dividends and interest payments to the then record holders and bearers of the New NGC Securities then outstanding. Any other assets or property remaining in any Disputed Claims Reserve after the resolution of all disputes relating thereto shall become assets or property of New NGC.

(g) *Adjustment of Pro Rata Shares.* If (1) a Disputed Claim against either of the Debtors in any Class becomes a Disallowed Claim, or (2) in the case of NGC, the Claimants holding Allowed NGC Administrative Convenience Claims reject this Plan and their respective Claims are treated as NGC Class 4A or 4B Claims, as the case may be, pursuant to this Plan, then the Pro Rata Share to which Claimants holding Allowed Claims against such Debtor in the Class affected by any such event shall be proportionately adjusted. The adjustments provided for in this **Section 5.12(g)** are not applicable to Asbestos Claims.

(h) *Asbestos Claims.* No Disputed Claims Reserve will be established for Asbestos Claims. All Asbestos Claims will

be resolved by the Asbestos Claims Resolution Facilities in accordance with **Section 5.1** of this Plan.

5.13 *Withholding of Taxes*. Reorganized NGC, New NGC, the Disbursing Agent, the Fund Administrators, and each Existing NGC Indenture Trustee shall withhold from any assets and property distributed under this Plan any assets and or property which must be withheld for federal, state and local taxes payable by the Person entitled to such property to the extent required by applicable law.

5.14 *Treasury Securities*. Each share of Existing NGC Common Stock and Existing Aancor Common Stock held in treasury by either Debtor immediately before the Effective Date will be cancelled and extinguished without any action on the part of either of the Debtors and no payment or other consideration shall be made with respect thereto.

5.15 *Cancellation of Existing NGC Indentures*. On the Effective Date, the Existing NGC Indentures shall, except as provided in this Plan, be deemed cancelled, terminated and of no further force or effect. Notwithstanding the foregoing, such cancellation of the Existing NGC Indentures shall not impair the rights of holders of the Existing NGC Debt Securities to receive distributions on account of such Existing NGC Debt Securities pursuant to this Plan, nor shall such cancellation impair the rights of the respective Existing NGC Indenture Trustees to enforce their Liens, if any, under the Existing NGC Indentures. The Existing NGC Debt Securities shall not be cancelled other than pursuant to **Section 5.10(c)** of this Plan and, until such cancellation, such Existing NGC Debt Securities shall be evidence of the entitlement of the holder thereof to receive distributions pursuant to this Plan.

Appendix A

5.16 *NGC Employee Benefit Plans.* On the Effective Date, New NGC will assume and continue the NGC Employee Benefit Plans; *provided, however*, New NGC shall not assume or be obligated for payments under any executive deferred compensation plan or arrangement which was in effect on and pursuant to which payments were being made by NGC as of the Petition Date.

5.17 *Working Capital Loan.* On the Effective Date, the Working Capital Lender shall make available to New NGC the Working Capital Loan which shall be evidenced and secured by the Working Capital Loan Documents.

5.18 *Working Capital Loan Documents.* Before the Effective Date, New NGC and the Working Capital Lender shall execute and deliver the Working Capital Loan Documents and funds shall be available to New NGC under the Working Capital Loan on the Effective Date.

5.19 *Payment of GECC DIP Loan.* On the Effective Date, any advances under the GECC DIP Loan shall be paid in full from the first disbursement of the Working Capital Loan, and any outstanding letters of credit issued under the GECC DIP Loan shall be cancelled, transferred or reissued pursuant to the Working Capital Loan Documents.

5.20 *Release of the Liens of GECC.* Subject to the payments to be made to GECC on account of the GECC DIP Loan, GECC shall deliver to NGC executed instruments in recordable form, satisfactory to NGC, to release and satisfy the Liens held by GECC encumbering the assets and property of NGC.

5.21 *Unclaimed Property.* Any New NGC Securities, Cash, or other assets and property to be distributed under this Plan (other than NGC Asbestos Settlement Fund Assets and Reorganized NGC Assets), which remain unclaimed or otherwise not deliverable to the Person entitled thereto before the *later of*: (a) two (2) years after the Confirmation Date or (b) sixty (60) calendar days after an Order allowing such Person's Claim or Interest becomes a Final Order, shall become vested in, and shall be transferred and delivered to, New NGC for distribution pursuant to this Plan. In such event, such Person's Claim or Interest shall no longer be deemed to be *"Allowed"* and such Person shall be deemed to have no further Claim or Interest in respect of such distribution and shall not participate in any further distributions under this Plan.

5.22 *Exoneration and Reliance.* Provided that the respective affiliates, officers, directors, shareholders, members, representatives (including the Legal Representative), attorneys, financial advisors, and agents of the Debtors, Reorganized NGC, New NGC, the Legal Representative, and the Official Committees act in good faith, they shall not be liable to any Claimant or other party with respect to any action, forbearance from action, decision, or exercise of discretion taken during the period from the Petition Date to the Effective Date in connection with: (a) the operation of the Debtors, the Debtors' Subsidiaries, New NGC, or Reorganized NGC; (b) the implementation of any of the transactions provided for, or contemplated in, this Plan or the Plan Documents, including the Assets Sale pursuant to the Assets Purchase Agreement, the NGC Asbestos Settlement Fund pursuant to the NGC Asbestos Settlement Fund Documents, and the

Reorganized NGC Securities Trust pursuant to the Reorganized NGC Securities Trust Agreement; or (c) the administration of this Plan or the assets and property (including any Cash distributed to NGC Class 3) to be distributed pursuant to this Plan and the Plan Documents other than for willful misconduct or gross negligence. The Debtors, Reorganized NGC, New NGC, the Official Committees, the Legal Representative, and their respective affiliates, officers, directors, shareholders, members, representatives, attorneys, financial advisors, and agents may rely upon the opinions of counsel, certified public accountants, and other experts or professionals employed by the Debtors, Reorganized NGC, New NGC, the Official Committees, and the Legal Representative, respectively, and such reliance shall conclusively establish good faith. In any action, suit or proceeding by any Claimant, Interestholder or other party in interest contesting any action by, or non-action of, Debtors, Reorganized NGC, New NGC, the Official Committees, the Legal Representative, or their respective affiliates, officers, directors, shareholders, members, representatives, attorneys, financial advisors, and agents as not being in good faith, the reasonable attorneys' fees and costs of the prevailing party shall be paid by the losing party and as a condition to going forward with such action, suit, or proceeding at the outset thereof, all parties thereto shall be required to provide appropriate proof and assurances of their capacity to make such payments of reasonable attorneys' fees and costs in the event they fail to prevail.

5.23 *Form of Payments.* Payment to be made by the Debtors or the Disbursing Agent pursuant to this Plan shall

be made in Cash or by check drawn on a domestic bank or by wire transfer from a domestic bank.

5.24 *Further Authorizations.* The Debtors, if and to the extent necessary, shall seek such orders, judgments, injunctions, and rulings that may be required to carry out further the intentions and purposes, and give full effect to the provisions, of this Plan.

5.25 *Plan Documents.* By the Plan Documents Filing Date, the Debtors shall file with the Bankruptcy Court unexecuted copies of Plan Documents, together with all necessary exhibits or schedules thereto, as may be necessary or appropriate to effectuate the terms and conditions of this Plan and the Disclosure Statement. The table of contents for this Plan indicates which Plan Documents are attached to this Plan as distributed and which are only available for review in the Plan Documents Review Center. Any party in interest may review the Plan Documents on any Business Day during normal business hours (9:00 a.m. to 4:30 p.m.) in the Plan Documents Review Center.

5.26 *Transfer Taxes.* The issuance, transfer or exchange of any of the Plan Securities issued under, or the transfer of any other assets or property pursuant to, this Plan or the Plan Documents, or the making or delivery of an instrument of transfer under this Plan or the Plan Documents, shall not (and the Confirmation Order shall so order), under section 1146 of the Bankruptcy Code, be taxed under any law imposing a stamp tax, transfer tax or other similar tax.

5.27 *Recordable Order.* The Confirmation Order shall be declared to be in recordable form, and shall be accepted

by any recording officer for filing and recording purposes without further or additional orders, certifications, or other supporting documents.

5.28 *Effectuating Documents; Further Transactions.* The Chairman of the Board, President or any Vice President of each Debtor shall be authorized to execute, deliver, file, or record such contracts, instruments, releases, indentures, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and further evidence the terms and conditions of this Plan. The Secretary or any Assistant Secretary of each Debtor shall be authorized to certify or attest to any of the foregoing actions.

5.29 *Tax Representations.* Receipt of any of the shares of the New NGC Common Stock by any Claimant pursuant to this Plan, shall constitute a representation by such Claimant that it has no present intention of disposing of such shares in any manner that would cause the Assets Sale and the distribution of the New NGC Securities, as contemplated by this Plan, to fail to qualify under section 368(a)(1)(G) (or any other applicable nonrecognition provision) of the IRC.

5.30 *Corporate Action.* All matters provided for under this Plan and under the Plan Documents involving the corporate structure of either of the Debtors or New NGC, Reorganized NGC or Austin or corporate action to be taken by, or required of either of the Debtors, New NGC, Reorganized NGC or Austin, shall be deemed to have occurred and be effective as provided herein, and shall be authorized and approved in all respects without any requirement for further action by the stockholders or directors of any of such entities.

5.31 *NGC's Historical Asbestos Documents.* On the Effective Date, NGC shall transfer to the NGC Asbestos Settlement Fund those of NGC's historical records which relate to NGC's historical mining, manufacturing, and sale of asbestos and asbestos-containing products. New NGC shall cooperate, on a reasonable basis, with the Fund Administrators on issues relating to the transfer, identification, authentication, and location of such records.

ARTICLE VI

EFFECTS OF PLAN CONFIRMATION

6.1 *Debtor Actions.* Except for those Debtor Actions, including LBO Actions which may be compromised and settled pursuant to this Plan, the Debtor Actions and the Insurance Debtor Actions shall be preserved and retained by the respective Debtors for enforcement subsequent to the Confirmation of this Plan, and on the Effective Date, such actions, other than the Retained Debtor Actions, shall be assigned to and vested in New NGC, as a *"representative"* of the Estates of Aancor or NGC, as the case may be, and the Retained Debtor Actions shall be assigned to and vested in Reorganized NGC as a *"representative"* of the Estate of NGC, each being appointed by the Bankruptcy Court for such purposes within the meaning of section 1123(b)(3) of the Bankruptcy Code, and a finding to such effect shall be made in and be a part of, the Confirmation Order, without any further action by the Debtors, New NGC, Reorganized NGC, or the Bankruptcy Court. Such Debtor Actions and Insurance Debtor Actions shall be so vested free and clear of all liens, security interests and other claims or causes of action. The

Debtor Actions, the Insurance Debtor Actions, and the proceeds of the Debtor Action Recoveries (exclusive of the Retained Debtor Action Recoveries) and Insurance Debtor Action Recoveries shall be deemed to be part of: (a) the NGC Sale Assets in the case of NGC and (b) in the case of Aancor, the assets and property distributed to Claimants holding Allowed Claims against Aancor pursuant to **Section 4.2** of this Plan. New NGC, at its option, may apply the proceeds of any of NGC's Debtor Action Recoveries or insurance Debtor Action Recoveries to the repurchase or payment, as the case may be, of New NGC Securities in such manner and amount as New NGC deems to be appropriate.

6.2 *Discharge and Release of Claims.* Except as otherwise provided in this Plan, the entry of the Confirmation Order, as of the Effective Date, will act as a full and complete discharge of all Claims against or Interests in the Debtors (or any one of them), the Reorganized NGC Assets, the NGC Asbestos Settlement Fund Assets, and the NGC Sale Assets of any nature whatsoever, including, without limitation, any liability of a kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, that arose, or has been asserted against, the Debtors (or either of them) at any time before the entry of the Confirmation Order or that arises from any pre-Confirmation conduct of the Debtors (or either of them) whether or not the Claim is known to or knowable by the Claimant or Interestholder. The discharge of the Debtors will become effective as to each Claim and Interest, whether or not the Claim or Interest constituted an Allowed Claim or Allowed Interest and whether or not the holder of the Claim or Interest voted to accept this Plan. In addition, the Confirmation Order will operate as a general resolution with

prejudice, as of the Effective Date, of all pending legal proceedings against the Debtors and their respective assets and properties as well as any proceedings not yet instituted against the Debtors or their respective assets and properties, except as otherwise provided in this Plan. As provided in section 524 of the Bankruptcy Code, the discharge herein provided operates as an injunction against the prosecution of any Claim or Interest so discharged.

6.3 *No Liability for Tax Claims*. Unless a taxing authority has asserted a Claim against the Debtors before the appropriate bar date established therefor, no Claim of such authority will be Allowed against the Debtors, Reorganized NGC, New NGC, or the NGC Asbestos Settlement Fund for taxes, penalties or interest arising out of the failure, if any, of the Debtors to have filed any tax return, including, but not limited to, any income tax return or franchise tax return in any prior year or arising out of an audit of any return for a period before the Petition Date.

6.4 *Revesting*. Except as otherwise expressly provided in this Plan, on the Effective Date, each Debtor will be vested with all of the assets and property of its respective Estate (exclusive of the NGC Sale Assets), free and clear of all claims, liens, encumbrances, charges, and other interests of Claimants or Interestholders, and may operate its business free of any restrictions imposed by the Bankruptcy Code or by the Bankruptcy Court; *provided, however*, that each Debtor shall continue as a debtor in possession under the Bankruptcy Code until the Effective Date, and, thereafter, each Debtor may operate its business free of any restrictions imposed by the Bankruptcy Code or the Bankruptcy Court.

6.5 *Injunction.* Except as otherwise expressly provided in this Plan, the Confirmation Order will provide that: (a) all Persons who have held, hold or may hold Claims, including, without limitation, Asbestos Claims (including Unknown Asbestos Disease Claims), or who have held, hold or may hold Existing Aancor Common Stock or Existing NGC Securities, and (b) the Debtors, New NGC, Reorganized NGC, Austin, and any of their respective officers, directors, employees, Affiliates or Subsidiaries are permanently enjoined on and after the Confirmation Date from: (1) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund or any of their respective officers, directors, employees, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Claim or Interest; (2) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person with respect to any such Claim or Interest; (3) creating, perfecting or enforcing any encumbrance of any kind against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund or any of their respective

officers, directors, employees, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; (4) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; and (5) any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of this Plan, the Plan Documents, or the NGC Asbestos Settlement Fund Documents; *provided, however*, that such injunction shall not impair (a) the rights of Persons with Asbestos Claims to assert such Asbestos Claims against the NGC Asbestos Settlement Fund in accordance with the NGC Asbestos Claims Resolution Procedures or (b) the rights of Reorganized NGC, New NGC, or the Fund Administrators, as the case may be, to prosecute any Debtor Action, Insurance Debtor Action, or Asbestos Insurance Debtor Action.

6.6 *Term of Injunctions or Automatic Stays.* Unless otherwise provided in this Plan or by Order of the Bankruptcy

Court, all injunctions or automatic stays provided for in the Reorganization Cases pursuant to section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date shall remain in full force and effect until the Consummation Date.

6.7 *Disallowed Claims and Disallowed Interests.* The filing of this Plan and its submission to Claimants and Interestholders holding all Claims against and Interests in the Debtors shall constitute an objection to all Claims and Interests that are not Allowed under section 502 of the Bankruptcy Code. On and after the Effective Date, the Debtors will be fully and finally discharged of any obligation on a Disallowed Claim or Interest, and any Order or judgment creating a Disallowed Claim or Interest which is not a Final Order as of the Effective Date solely because of a Person's right to move for reconsideration of such Order or judgment pursuant to sections 502(e)(2) and/or 502(j) of the Bankruptcy Code and Bankruptcy Rule 3008 shall nevertheless become and be deemed a Final Order on the Effective Date. The Confirmation Order, except as otherwise provided herein, shall constitute a Final Order: (a) disallowing all Claims (other than Asbestos Claims) and Interests to the extent such Claims and Interests are not allowable under any provision of section 502 of the Bankruptcy Code, including, without limitation, time-barred Claims and Interests and Claims for unmatured interest; and (b) disallowing or subordinating, as the case may be, any Claims for penalties or punitive damages.

6.8 *Settlement and Resolution of Certain LBO Actions.*

(a) *Release.* Payments and distributions received hereunder by Claimants holding Claims against and

Interestholders holding Interests in the Debtors shall not be subject to disgorgement, reallocation or challenge in respect of any alleged LBO Action. On the Effective Date, the Debtors (whether as debtors, as debtors in possession or on behalf of Claimants or Interestholders), subject to Bankruptcy Court approval and the provisions of **Section 6.8(c)** below, all Persons asserting claims, demands, or causes of action or who may in the future assert claims, demands, or causes of action derivatively or otherwise through, or on behalf of, any of the Debtors and all present and former directors, officers, agents, attorneys, advisors, accountants, financial advisors, investment bankers, employees, and shareholders of the Debtors, in their respective capacities as such (herein collectively called the *"Releasors"*) shall be deemed, for good and valuable consideration, to have released and discharged any and all Existing NGC Indenture Trustees, past and present holders of the Existing NGC Debt Securities, past and present holders of the Existing Aancor Common Stock, past and present holders of any common stock of NGC, all banks, financial institutions and other providers of credit which in any way participated in the financing of the LBO (or any part thereof), past and present officers, directors, employees of NGC, and any and all of their respective successors, predecessors, assignors, assignees, parents, subsidiaries, stockholders, affiliates, past and present directors, trustees, officers, employees, agents, attorneys, accountants, investment bankers and financial advisors, and in the case of a partnership, its past and present partners, and in the case of individuals, their respective heirs, receivers, conservators, beneficiaries, executors, and administrators (and any other Person who, within the meaning of Rule 12b-2 promulgated

under the Exchange Act, *"controls"*, is *"controlled by"* or is under *"common control"* with, any of such Persons) past or present (herein collectively called the "Released Parties") from any and all LBO Actions that the Releasors (whether directly or on behalf of Claimants), or any Person claiming derivatively or otherwise through, or on behalf of, any of the Releasors, ever had, now has, or hereafter can, shall or may have against any of the Released Parties, arising from, or in connection with or related in any way to, the LBO or any merger, transaction or other activity or conduct engaged in or undertaken in connection with, the LBO, including, without limitation: (1) the offer, sale, purchase or resale of any securities of NGC or Aancor, or any registration statement, preliminary prospectus, prospectus, disclosure or omission related thereto; (2) any extension, supplementation or restructuring of the indebtedness of any of the Debtors, including any breach of duty owed to any of the Debtors arising from any extension, supplementation or restructuring of that indebtedness; (3) any engagement or role of, or services rendered by, any or all of the Released Parties in connection with any of the foregoing; (4) actions taken or not taken by the Released Parties in connection with the Debtors' pre-petition indebtedness; and (5) any claim or demand made, cause of action asserted, or matter alleged in any LBO Action.

(b) *Compromise and Settlement of LBO Actions.* Subject to Bankruptcy Court approval and the provisions of **Section 6.8(c)** of this Plan, pursuant to Bankruptcy Rule 9019 and as consideration for the distributions and other benefits provided under this Plan, the provisions of this **Section 6.8** shall constitute a good faith compromise and settlement of

any LBO Actions or any other claims, causes of action, demands, or controversies relating to the LBO that could be brought (or could have been brought) by the Releasors (whether directly or on behalf of Claimants or Interestholders) against or involving the Released Parties, which compromise and settlement is in the best interests of Claimants and the respective Estates of the Debtors and is fair, equitable and reasonable. This settlement shall be approved by the Bankruptcy Court as a settlement of all such claims or causes of action that the Debtors (and any person or entity suing derivatively or otherwise on any Debtors' behalf) may hold against the Released Parties. The Bankruptcy Court's approval of this settlement pursuant to any applicable state laws, including without limitation, the laws of the states of Texas, North Carolina, New York and Delaware, given and made after due notice and opportunity for hearing, shall bar any claim, demand, or cause of action against the Released Parties for indemnity or contribution (or any similar claim, demand, or cause of action) by any other entity that is claimed to be a joint tortfeasor or otherwise jointly liable in respect of such LBO Actions or with any of the Released Parties. The Confirmation Order shall enjoin the prosecution of any LBO Action against any Person released pursuant to this **Section 6.8**, whether directly, derivatively or otherwise.

(c) *Consent to Release of LBO Actions Against Non-Debtor Released Parties.* Notwithstanding anything to the contrary contained in **Section 6.8(a)** of this Plan, the release of the LBO Actions which have been or may be asserted against any of the Released Parties other than the Debtors (such third parties being herein called the

"Non-Debtor Released Parties") by Persons other than the Debtors are to be made solely on a contractual release basis and not by court injunction or discharge of the Debtors pursuant to sections 524 and 1141 of the Bankruptcy Code. Only those Persons who consent to release the Non-Debtor Released Parties by affirmatively checking the *"I CONSENT TO RELEASE"* box on the ballot provided to them to accept or reject this Plan shall have been deemed to have contractually released the Non-Debtor Released Parties from the LBO Actions which such Persons have asserted or may assert against any of the Non-Debtor Released Parties. A vote to accept or reject this Plan is independent from the contractual release of the Non-Debtor Released Parties under **Section 6.8(a)** hereof. A vote to "accept" this Plan by any Claimant does not of itself constitute a release by any Person (other than the Debtors) of any LBO Action which it has asserted or may assert against any of the Non-Debtor Released Parties pursuant to **Section 6.8(a)** above.

(d) *Approval by the Bankruptcy Court of the Release of LBO Actions by the Debtors.* The release by the Debtors of the LBO Actions contemplated by this **Section 6.8** which have been or which may be asserted against the Non-Debtor Released Parties requires the approval of the Bankruptcy Court as part of the Confirmation of this Plan. If the release of the LBO Actions contemplated by this **Section 6.8** is not approved by the Bankruptcy Court as part of the Confirmation of this Plan, this Plan shall be amended so as to provide that the recoveries, if any, from such LBO Actions shall be distributed to the Claimants in the impaired NGC Classes under this Plan.

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ARTICLE VII

TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

7.1 *General.* This Plan constitutes and incorporates a motion by the Debtors, pursuant to section 365 of the Bankruptcy Code, to reject any and all executory contracts and unexpired leases of the Debtors, *except*: (a) those which shall, before the Confirmation Date, have been rejected or assumed pursuant to an Order of the Bankruptcy Court or be the subject of pending motions by any of the Debtors to reject or assume pursuant to section 365 of the Bankruptcy Code; (b) those executory contracts and unexpired leases set forth in **Section 7.2** of this Plan; (c) those specifically designated on the schedule attached as **Exhibit F** hereto which are to be assumed, or assumed and assigned where applicable, by the respective Debtor (which list may be further amended or supplemented prior to the Confirmation of this Plan); and (d) those which are specifically treated otherwise in this Plan. The assumption by NGC and assignment to New NGC of collective bargaining or other similar labor agreements and other agreements or arrangements with salaried or hourly employees shall not preclude New NGC from revising any NGC Employee Benefit Plans or other arrangements or agreements with employees or substituting new employee benefit plans or arrangements therefor.

7.2 *Rejected Executory Contracts and Unexpired Leases.* Notwithstanding anything to the contrary set forth in **Section 7.1** hereof, the Debtors hereby reject, pursuant to section 365 of the Bankruptcy Code, the following executory

contracts and unexpired leases: (a) all product warranties of NGC (including any obligation of NGC to pay any costs or expenses related to such product warranties) which relate to asbestos or asbestos-containing products which were made, mined, manufactured, produced, distributed, sold, or supplied by NGC, if the liabilities or obligations resulting thereunder constitute, and will be treated as, Asbestos Claims pursuant to this Plan; (b) any and all executory contracts and unexpired leases not described in the schedule attached as **Exhibit F** hereto (which list may be further ended or supplemented prior to the Confirmation of this Plan) or which shall, before the Confirmation Date, have been rejected or assumed pursuant to an Order of the Bankruptcy Court or be the subject of pending motions by either of the Debtors to reject or assume pursuant to section 365 of the Bankruptcy Code; and (c) any product warranties of NGC (including any obligation to pay any costs or expenses related to such warranties), exclusive of those product warranties described in subparagraph (a) of this **Section 7.2**, if such product warranties cover products no longer made, manufactured, mined, produced, distributed, sold, or supplied by NGC.

7.3 *Continuation of Product Warranties.* New NGC, in its sole discretion, may elect to honor any product warranty rejected pursuant to **Section 7.2** of this Plan if, and to the extent, that honoring such product warranty would, in the judgment of management of New NGC, confer a reasonably comparable benefit to the business of New NGC.

7.4 *Damages Upon Rejection.* The Bankruptcy Court shall determine the dollar amount, if any, of the Claim of any Claimant seeking damages by reason of the rejection of

any such executory contract or unexpired lease; *provided* such Claimant files a Proof of Claim in the Bankruptcy Court before thirty (30) calendar days following the Confirmation Date. To the extent such damages are finally Allowed by the Bankruptcy Court, such Claimants shall thereafter become Claimants holding Aancor Class 3, NGC Class 3, or NGC Class 4A or 4B Claims, as the case may be, and shall receive distributions as Claimants holding Allowed Claims in such Classes pursuant to this Plan. This Plan shall constitute notice to Persons who may assert a Claim for damages for the rejection of an executory contract or unexpired lease of the bar date for filing a Proof of Claim in connection therewith; *provided, however*, that the Debtors shall have no obligation to notify such Persons that the Confirmation Date has occurred.

7.5 *Survival of the Debtors' Corporate Indemnities.* Any obligations of the Debtors, pursuant to their respective corporate charters and by-laws, to indemnify their respective directors, officers, agents, employees, attorneys, and representatives, with respect to all present and future actions, suits, and proceedings against the Debtors or any of such officers, directors, agents, employees, attorneys, or representatives, based upon any act or omission related to service with, or for or on behalf of, the Debtors (to the extent that such obligations are not otherwise discharged pursuant to this Plan), shall not be discharged or impaired by Confirmation or Consummation of this Plan, but shall be deemed and treated as executory contracts that are assumed by the applicable Debtor pursuant to this Plan and section 365 of the Bankruptcy Code and assigned to New NGC as of the Confirmation Date; *provided, however*, that the above

described indemnity obligations shall be limited to those officers, directors, employees, agents, attorneys, or representatives of the Debtors who have served in such capacities during the course of the Reorganization Cases. Accordingly, such indemnification obligations shall survive unaffected by the reorganization contemplated by this Plan and shall be performed and honored by New NGC regardless of the Confirmation of this Plan.

ARTICLE VIII

RETENTION OF JURISDICTION

8.1 *Jurisdiction*. Until the Reorganization Cases are closed, the Bankruptcy Court shall retain the fullest and most extensive jurisdiction that is permissible, including that necessary to ensure that the purposes and intent of this Plan are carried out and to hear and determine all Claims set forth in **Article II** of this Plan that could have been brought before the entry of the Confirmation Order. Except as otherwise provided in this Plan, the Bankruptcy Court shall retain jurisdiction to hear and determine all Claims against the Debtors and to adjudicate and enforce the Debtor Actions and all other causes of action which may exist on behalf of the Debtors. Nothing herein contained shall prevent New NGC from taking such action as may be necessary in the enforcement of any Debtor Action, Insurance Debtor Action, or other cause of action which may exist on behalf of the Debtors and which may not have been enforced or prosecuted by the Debtors, which Debtor Action, Insurance Debtor Action, or other causes of action shall survive Confirmation of this Plan and shall not be affected thereby except as specifically provided herein.

8.2 *General Retention.* Following the Confirmation of this Plan, the Bankruptcy Court shall further retain jurisdiction for the purpose of classification of any Claim of any Claimant and the re-examination of Claims which have been Allowed for purposes of voting, and the determination of such objections as may be filed with the Bankruptcy Court against any Claim of any Claimant. The failure by the Debtors to object to, or examine, any Claim for the purposes of voting, shall not be deemed a waiver of the right of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or the Asbestos Claims Resolution Facilities, as the case may be, to object to, or re-examine, such Claim, in whole or part.

8.3 *Specific Purposes.* In addition to the foregoing, the Bankruptcy Court shall, without limitation, retain jurisdiction for the following specific purposes after the Confirmation of this Plan:

(a) to modify this Plan or any of the Plan Documents after Confirmation pursuant to the Bankruptcy Rules and the Bankruptcy Code;

(b) to assure the performance by Reorganized NGC, New NGC, Austin, the New NGC Senior Note Indenture Trustee, the Existing NGC Indenture Trustees, the Disbursing Agent(s), the New NGC Warrant Agent, and the Fund Administrators, of their respective obligations to make distributions under this Plan, the Plan Documents, the Plan Securities Documents, the Existing NGC Indentures, and the NGC Asbestos Settlement Fund Documents;

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(c) to enforce and interpret the terms and conditions of this Plan and the Plan Documents;

(d) to enter such Orders, including injunctions, as are necessary to enforce the title, rights, and powers of Reorganized NGC, New NGC and the NGC Asbestos Settlement Fund, including, without limitation, Orders authorizing or directing amendments to the articles of incorporation and bylaws of Reorganized NGC or New NGC and Orders authorizing or directing amendments, extensions or waivers of the terms of the Assets Purchase Agreement and the Plan Securities Documents, and to impose such limitations, restrictions, terms, and conditions on such title, rights, and powers as the Bankruptcy Court may deem necessary;

(e) to enter an Order concluding and terminating the Reorganization Cases;

(f) to enter such Orders as may be necessary to facilitate and effect the liquidation and disposition by Reorganized NGC of any of the Reorganized NGC Assets;

(g) to supervise, where required, liquidation by New NGC of the assets and property of Aancor;

(h) to correct any defect, cure any omission, or reconcile any inconsistency in this Plan, the Plan Documents, or the Confirmation Order as may be necessary to carry out the purposes and intent of this Plan, including the adjustment of the date(s) of performance under this Plan, the Plan Documents, and any other documents related thereto in the

event the Effective Date does not occur as provided herein, so that the intended effect of this Plan, the Plan Documents, and such other documents may be substantially realized thereby;

(i) to decide issues concerning federal, state or local tax reporting and withholding which arise in connection with the Confirmation or Consummation of this Plan;

(j) to hear and determine all Debtor Actions and collect, compromise, discharge, and/or release all Debtor Action Recoveries and grant such other relief as may be appropriate thereto;

(k) to enforce and interpret the terms and conditions of the Assets Purchase Agreement and the other Plan Documents;

(l) to hear and approve all professional fees incurred before the Effective Date;

(m) to approve the appointment of the Fund Administrators and their successors;

(n) to review and supervise, where necessary, and approve reports of the Fund Administrators as to: (1) the actions of the Fund Administrators and the Fund Advisory Committees and their members, (2) the administration of the NGC Asbestos Settlement Fund, and (3) the disposition and distribution of the NGC Asbestos Settlement Fund Assets;

(o) to hear and determine any causes of action arising during the period from the Petition Date through the Effective

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Date or in any way related to this Plan or the transactions contemplated hereby against the Debtors, Reorganized NGC, New NGC, the NGC Asbestos Settlement Fund, the Official Committees, the Legal Representative, and their respective officers, directors, shareholders, members, attorneys, financial advisors, representatives, and agents;

(p) to determine any and all applications pending on Confirmation for the rejection, assumption or assignment of executory contracts or unexpired leases and the allowance of any Claim resulting therefrom;

(q) to determine such other matters and for such other purposes as may be provided in the Confirmation Order;

(r) to consider and act on the compromise and settlement of any Claim against or Interest in the Debtors or their Estates;

(s) to determine all questions and disputes regarding title to the assets of the Debtors or their Estates;

(t) to construe, enforce and resolve all questions and disputes relating to collective bargaining or employment agreements existing or approved by the Bankruptcy Court at or before Confirmation;

(u) to construe and take any action to enforce any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement and the releases executed and exchanged in connection therewith, and to issue such Orders as may be necessary for the implementation, execution and

consummation of any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement, and to determine all questions and issues arising under or with respect to any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement;

(v) to approve the voluntary dismissal of the Stonewall Litigation;

(w) to enter such Orders as are necessary to enforce, implement, or modify the Asbestos Claims Resolution Facilities (or either of them); and

(x) if applicable, to enter such Orders as are necessary to continue or terminate the participation of Reorganized NGC (or any successor thereto) in the CCR.

ARTICLE IX

CONDITIONS PRECEDENT TO CONFIRMATION AND EFFECTIVENESS

9.1 *Conditions to Confirmation.* Confirmation of this Plan shall not occur unless each of the following conditions has occurred or has been waived in a writing executed by each of the Debtors:

(a) *Disclosure Statement.* The Bankruptcy Court shall have approved the Disclosure Statement in a Final Order.

(b) *Confirmation Order.* The Confirmation Order in form and substance acceptable to each of the Debtors, shall have been entered by the Bankruptcy Court.

9.2 *Conditions to Effectiveness.* Notwithstanding any other provision of this Plan or the Confirmation Order, the Effective Date of this Plan shall not occur unless and until each of the following conditions has occurred or been waived in a writing executed by each of the Debtors, and, with respect to *Paragraphs* **(a)**, **(b)**, **(c)**, **(l)**, **(m)**, and **(n)** of this **Section 9.2** by the Asbestos Committee and the Legal Representative:

(a) *Final Confirmation Order.* The Confirmation Order shall have become a Final Order.

(b) *NGC Asbestos Settlement Fund.* The initial transfer and assignment of the NGC Asbestos Settlement Fund Assets to the NGC Asbestos Settlement Fund shall have been accomplished.

(c) *Reorganized NGC Securities Trust.* The Reorganized NGC Securities Trust shall have been created pursuant to this Plan, the Plan Securities Documents, the NGC Corporate Documents, and the Reorganized NGC Securities Trust Agreement, and the Reorganized NGC Common Stock transferred pursuant thereto.

(d) *Merger of Aancor into NGC.* The Merger of Aancor with and into NGC shall have been accomplished.

(e) *New NGC Senior Note Indenture.* The New NGC Senior Note Indenture shall have been qualified under the Trust Indenture Act of 1939, as amended.

(f) *Working Capital Loan.* New NGC and the Working Capital Lender shall have executed and delivered the

Working Capital Loan Agreement and the other Working Capital Loan Documents, and the Working Capital Lender shall have made available to New NGC the Working Capital Loan.

(g) *Assets Sale.* The Assets Sale shall have been closed pursuant to the Assets Purchase Agreement.

(h) *Issuance of the New NGC Securities.* The New NGC Securities shall have been issued and delivered to the Disbursing Agent pursuant to this Plan, the Plan Securities Documents, and the New NGC Corporate Documents.

(i) *Corporate Documents.* The NGC Corporate Documents, the Austin Corporate Documents, the New NGC Corporate Documents, the Plan Securities Documents, the NGC Asbestos Settlement Fund Documents, and the other applicable corporate documents necessary or appropriate to the implementation of this Plan shall have been executed, delivered, and, where applicable, filed with the appropriate governmental authorities.

(j) *NGC Employee Benefit Plans.* The NGC Employee Benefit Plans shall have been assumed by New NGC.

(k) *United States Trustee's Fees.* The fees of the United States Trustee then owing by the Debtors shall have been paid in full.

(l) *GECC DIP Loan.* The GECC DIP Loan shall be paid in full and documents permitting the Liens of GECC securing such GECC DIP Loan to be released pursuant to this Plan shall have been delivered to New NGC.

(m) *IRS Ruling.* The Debtors shall have obtained a private letter ruling (or rulings) from the IRS, satisfactory to the Debtors, the Legal Representative, and the Asbestos Committee, with respect to such federal income tax issues as may be necessary or appropriate to implement this Plan, including, without limitation, rulings that: (1) the transfer of the NGC Sale Assets to New NGC will be a non-taxable reorganization under section 368(a)(1)(G) (or any other applicable nonrecognition provision) of the IRC; and (2) the NGC Asbestos Settlement Fund is either a *"designated settlement fund"* under section 468B of the IRC or a *"qualified settlement fund"* within the meaning of the proposed regulations issued by the IRS pursuant to said section 468B, that transfers and payments to such fund contemplated by this Plan will be treated as paid when actually made and will constitute qualified payments within the meaning of section 468B(d)(1) of the IRC (if required for qualification under section 468B of the IRC), and that such fund will not be taxable upon the receipt of the NGC Asbestos Settlement Fund Assets.

(n) *Implementation of Asbestos Claims Resolution Facilities.* The Court shall have entered such Orders as are necessary to implement the respective Asbestos Claims Resolution Facilities.

9.3 *Waiver.* Notwithstanding any other provision of this Plan or the Confirmation Order, this Plan shall not be binding on any party in interest unless and until each of the foregoing conditions to Confirmation and the Effective Date has occurred or has been waived in a writing executed by the Persons required to execute such waiver pursuant to

Section 9.2 of this Plan, and the Confirmation Order shall be deemed annulled at such time as a condition to the Effective Date, that has not been waived in accordance with **Section 9.2** of this Plan, can no longer occur.

ARTICLE X

ACCEPTANCE OR REJECTION OF PLAN

10.1 *Classes Entitled to Vote.* Except as otherwise provided in the Existing NGC Indentures or applicable law, each impaired Class of Claims or Interests shall be entitled to vote separately to accept or reject this Plan. Any unimpaired Class of Claims or Interests shall not be entitled to vote to accept or reject this Plan. An impaired Class of Claims or Interests which is deemed to have rejected this Plan pursuant to section 1126(g) of the Bankruptcy Code shall not be entitled to vote to accept or reject this Plan. If a dispute arises as to whether a Claim or Interest of any Class of Claims or Interests is impaired under this Plan, the Bankruptcy Court shall, after notice and a hearing, determine such dispute.

10.2 *Class Acceptance Requirement.* A Class of Claims shall have accepted this Plan if it is accepted by at least two-thirds (2/3) in amount and more than one-half (1/2) in number of the Allowed Claims of such Class that have voted to accept or reject this Plan. A Class of Interests shall have accepted this Plan if it is accepted by Interestholders holding two-thirds (2/3) in amount of the Allowed Interests in such Class that have voted to accept or reject this Plan.

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10.3 *Confirmability and Severability of Plan.* The Confirmation requirements of section 1129 of the Bankruptcy Code must be satisfied separately with respect to each Debtor. Therefore, notwithstanding the incorporation of the separate plans of reorganization of NGC and Aancor in this Plan for purposes of, among other things, economy and efficiency, **Sections 4.1** and **4.2** (exclusive of the references in **Sections 4.1** to NGC) of this Plan, shall be deemed a separate chapter 11 plan for Aancor, and **Sections 4.1** and **4.3** (exclusive of the references in **Section 4.1** to Aancor) of this Plan shall be deemed a separate chapter 11 plan for NGC. Should either of such separate plans not be confirmed, the other Debtor may withdraw the other separate plan.

10.4 *Cramdown.* If any impaired Class of Claims fails to accept this Plan by the requisite majority, the Debtors (or either of them) reserve the right to request that the Bankruptcy Court confirm this Plan, including either of the separate plans contained herein, in accordance with section 1129(b) of the Bankruptcy Code.

ARTICLE XI

MISCELLANEOUS PROVISIONS

11.1 *Revocation of Plan.* The Debtors reserve the right to revoke and withdraw this Plan as to either or both Debtors before the entry of the Confirmation Order. If the Debtors (or either of them) revoke or withdraw this Plan, or if Confirmation of this Plan as to either or both of the Debtors does not occur, then, with respect to such Debtor or Debtors, as the case may be, this Plan shall be deemed null and void

and nothing contained herein shall be deemed to constitute a waiver or release of any Claims by or against such Debtor or Debtors, as the case may be, or any other Person or to prejudice in any manner the rights of such Debtor or Debtors, as the case may be, or Person in any further proceedings involving such Debtor.

11.2 *Headings*. Headings are utilized in this Plan for convenience and reference only and shall not constitute a part of this Plan for any other purpose.

11.3 *Due Authorization by Claimants*. Each and every Claimant who elects to participate in the distributions provided for herein warrants that Claimant is authorized to accept, in consideration of its Claim against either of the Debtors, the distributions provided for in this Plan, and that there are no outstanding commitments, agreements, or understandings, express or implied, that may or can in any way defeat or modify the rights conveyed, or obligations undertaken, by such Claimant under this Plan.

11.4 *Payment or Distribution Dates*. Whenever any payment or distribution to be made under this Plan shall be due on a day other than a Business Day, such payment or distribution shall, instead, be made, without interest, on the next Business Day thereafter.

11.5 *Modification of Payment Terms*. The Debtors reserve the right to modify the treatment of any Allowed Claim, as provided in section 1123(a)(4) of the Bankruptcy Code, at any time after the Effective Date upon the consent of the Claimant whose Allowed Claim treatment is being modified.

11.6 *Entire Agreement.* This Plan, as described herein and in the Disclosure Statement and Exhibits and Annexes hereto and thereto, sets forth the entire agreement and understanding among the parties hereto relating to the subject matter hereof and supersedes all prior discussions and documents. No party hereto shall be bound by any terms, conditions, definitions, warranties, understandings, or representations with respect to the subject matter hereof, other than as expressly provided for herein or as may hereafter be agreed to by the parties in writing.

11.7 *Administrative Claims Bar Date.* Unless otherwise ordered by the Bankruptcy Court, the Confirmation Order will operate to set a bar date for Administrative Claims, which bar date shall be sixty (60) days after the Effective Date. Claimants holding Administrative Claims against the Debtors not paid on the Effective Date may submit Proofs of Claim on or before such bar date. The notice of Confirmation to be delivered pursuant to Bankruptcy Rules 3020(c) and 2002(f) will set forth such date and constitute notice of the Administrative Claims bar date. New NGC and any other party-in-interest will have ninety (90) days after the Administrative Claims bar date to review and object to such Claims before a hearing on such Administrative Claims for determination by the Bankruptcy Court.

11.8 *Preservation of Insurance Claims.* The Debtors' discharge and release from all Claims as provided herein shall neither diminish nor impair the enforceability of any of the Insurance Policies purchased by, or on behalf of, the Debtors and any other Person and providing Insurance Coverage to the Debtors and certain other Persons which may cover Claims against the Debtors and such Persons.

11.9 *Confirmation Order.* In addition to the requirements set forth in this Plan, the Confirmation Order shall also ratify all transactions consistent with the provisions of this Plan and the Plan Documents effected by the Debtors during the period commencing on the Petition Date and ending on the Effective Date.

11.10 *Dissolution of the Official Committees.* On the Effective Date, the Trade and Bond Committee will be dissolved and the members thereof released and discharged of and from all further authority, duties, responsibilities, liabilities, and obligations related to, or arising from, the Reorganization Cases. The Asbestos Committee will, after the Effective Date, continue to serve until (a) the NGC Asbestos Settlement Fund has been created, (b) the NGC Asbestos Settlement Fund Assets (or the rights thereto) have been transferred to the NGC Asbestos Settlement Fund, and (c) the Fund Administrators are serving in their respective capacities, pursuant to this Plan and the NGC Asbestos Settlement Fund Documents; *provided, however*, that during the period after the Effective Date in which the Asbestos Committee continues to function, the Asbestos Committee's jurisdiction shall be strictly limited to participation in core and non-core related proceedings that affect Claimants holding Asbestos Claims and/or the recoveries of such Claimants under this Plan. Thereafter, the Asbestos Committee will be dissolved and its members released and discharged of and from all further authority, duties, responsibilities, liabilities, and obligations related to, or arising from, the Reorganization Cases.

11.11 *Discharge of the Legal Representative.* The Legal Representative will continue to serve, after the

Effective Date, until (a) the NGC Asbestos Settlement Fund has been created, (b) the NGC Asbestos Settlement Fund Assets (or the rights thereto) have been transferred to the NGC Asbestos Settlement Fund, and (c) the Fund Administrators are serving in their respective capacities, pursuant to this Plan and the NGC Asbestos Settlement Fund Documents; *provided, however*, that during the period after the Effective Date in which the Legal Representative continues to function, the Legal Representative's jurisdiction shall be strictly limited to participation in core and non-core related proceedings that affect Claimants holding Asbestos Claims and/or the recoveries of such Claimants under this Plan. Thereafter, the Legal Representative will be dissolved and released and discharged of and from all further authority, duties, responsibilities, liabilities, and obligations related to, or arising from, the Reorganization Cases.

11.12 *Governing Law.* **EXCEPT TO THE EXTENT THAT FEDERAL LAW (INCLUDING, WITHOUT LIMITATION, THE BANKRUPTCY CODE AND THE BANKRUPTCY RULES) IS APPLICABLE, THE RIGHTS AND OBLIGATIONS ARISING UNDER THIS PLAN SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO THE PRINCIPLES OF CONFLICTS OF LAW THEREOF.**

11.13 *Severability.* Should the Bankruptcy Court determine, prior to the Confirmation Date, that any provision in this Plan is either illegal on its face or illegal as applied to any Claim or Interest, such provision shall be unenforceable

either as to all Claimants holding Claims or Interestholders holding Interests or as to the Claimant or Interestholder holding such Claim or Interest as to which the provision is illegal, respectively. Such a determination of unenforceability shall in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

11.14 *Time.* In computing any period of time prescribed or allowed by this Plan, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is not a Business Day, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate days that are not Business Days shall be excluded in the computation.

11.15 *No Interest.* Except as expressly stated in this Plan or otherwise Allowed by the Bankruptcy Court, no interest, penalty or late charge arising after the Petition Date is to be allowed on any Claim.

11.16 *No Attorneys' Fees.* No attorneys' fees will be paid with respect to any Claim except as specified herein or as Allowed by a Final Order of the Bankruptcy Court.

11.17 *Addresses for Distributions to Claimants Holding Allowed Claims.* Unless otherwise provided in this Plan, the Plan Documents, or a Final Order of the Bankruptcy Court,

distributions to be made under this Plan to Claimants holding Allowed Claims and distributions of the Plan Securities and payments thereunder to be made by the New NGC Senior Note Indenture Trustee under the New NGC Senior Note Indenture to the Claimants holding Allowed Claims shall be made by first class United States mail, postage pre-paid to: (a) the latest mailing address set forth in a Proof of Claim timely filed with the Bankruptcy Court by or on behalf of such Claimant or (b) if no such Proof of Claim has been timely filed, the mailing address set forth in the Schedules filed by the Debtors in the Reorganization Cases, as amended. The Debtors, Reorganized NGC, New NGC, Austin, the Disbursing Agent (or Agents), the New NGC Warrant Agent, and the New NGC Senior Note Indenture Trustee shall not be required to make any other effort to locate or ascertain the address of the holder of any Claim.

11.18 *Consent to Jurisdiction*. Upon default under this Plan, Reorganized NGC, New NGC, and the Fund Administrators consent to the jurisdiction of the unit of the United States District Court for the Northern District of Dallas Division, known as the Bankruptcy Court for that District, or any successor thereto, and agree that it shall be the preferred forum for all proceedings relating to such default.

11.19 *Setoffs*. Subject to the limitations provided in section 553 of the Bankruptcy Code, the Debtors may, but shall not be required to, set off against any Claim or Interest and the payments or other distributions to be made pursuant to this Plan in respect of such Claim or Interest, claims of any nature whatsoever the Debtors may have against the

Claimant or Interestholder holding such Claim or Interest, but neither the failure to do so nor the allowance of any Claim or Interest hereunder shall constitute a waiver or release by the Debtors of any such claim that the Debtors may have against such Claimant or Interestholder.

11.20 *Successors and Assigns*. The rights, duties and obligations of any Person named or referred to in this Plan shall be binding upon, and shall inure to the benefit of, the successors and assigns of such Person.

ARTICLE XII

REGISTRATION AND RELATED RIGHTS

Each recipient of any of the New NGC Securities pursuant to this Plan shall have the benefit of the registration and related rights set forth in the New NGC Registration Rights Agreement, which registration rights, however, shall be subject to the restrictions and limitations set forth in the New NGC Registration Rights Agreement.

ARTICLE XIII

MODIFICATION OF PLAN

The Debtors may propose amendments to, or modifications of, this Plan under section 1127 of the Bankruptcy Code at any time prior to the Confirmation Date. After the Confirmation Date, the Debtors may remedy any defects or omissions or reconcile any inconsistencies in this Plan, in the Plan Documents, or the Confirmation Order or

any other Order entered for the purpose of implementing this Plan in such manner as may be necessary to carry out the purposes and intent of this Plan so long as the interests of Claimants are not materially and adversely affected.

ARTICLE XIV

NOTICES

Any notice given in connection herewith shall be as follows:

National Gypsum Company, and
Aancor Holdings, Inc.
2501 Cedar Springs Road
Suite 700
Dallas, Texas 75201
Attn: Office of the General Counsel

With a copy to:
Johnson & Gibbs, a Professional Corporation
100 Founders Square
900 Jackson Street
Dallas, Texas 75202-4499
(214) 977-9000
Attn: Boe W. Martin, Esq.,
Counsel to the Debtors

Appendix A

DATED as of September 4, 1992

NATIONAL GYPSUM COMPANY,
a Delaware corporation

By: /s/ J. MICHAL CONAWAY
J. Michal Conaway,
Vice President and
Chief Financial Officer

AANCOR HOLDINGS, INC.,
a Delaware corporation

By: /s/ J. MICHAL CONAWAY
J. Michal Conaway,
Vice President and
Chief Financial Officer

JOHNSON & GIBBS,
a Professional Corporation
100 Founders Square
900 Jackson Street
Dallas, Texas 75202-4499
(214) 977-9107

By: /s/ BOE W MARTIN
Boe W. Martin

COUNSEL TO NATIONAL GYPSUM COMPANY
AND AANCOR HOLDINGS, INC.

APPENDIX B — THIRD TECHNICAL MODIFICATIONS TO PLAN DATED MARCH 5, 1993

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Case No. 390-37213-SAF-11
(Chapter 11)

IN RE: NATIONAL GYPSUM COMPANY,
a Delaware corporation,

Debtor.

Case No. 390-37214-SAF-11
(Chapter 11)

IN RE: AANCOR HOLDINGS, INC.,
a Delaware corporation,

Debtor.

Jointly Administered

THIRD TECHNICAL MODIFICATIONS OF FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION OF NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

National Gypsum Company and Aancor Holdings, Inc., debtors and debtors-in-possession in the above-captioned chapter 11 cases, hereby submit the following modifications

("***this Third Modification***") to the First Amended and Restated Joint Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for National Gypsum Company and Aancor Holdings, Inc. (the "***Plan***")[1] dated as of September 4, 1992, which Third Modification is for the purpose of modifying the Plan so as to: *(i)* comply with the findings and rulings made by the Court on January 29 and February 8, 1993, and *(ii)* making such other technical amendments and changes as the Debtors deem to be necessary or appropriate:

1. Section 1.17 of the Plan is hereby modified to read in its entirety as follows:

> "1.17 *'Asbestos Disease Claims'* means any Current or Unknown Asbestos Disease Claim against, or any debt, obligation, or liability of, either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiaries), and their present or former employees (including, without limitation, all thereof in the nature of or sounding in tort, contract, warranty, or any other theory of law, equity, or admiralty) for, relating to, or arising by reason of, directly or indirectly, physical, emotional, or other personal injuries or damages

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1. Capitalized terms used in this Third Modification shall have the meanings ascribed to them in the Plan, unless otherwise defined herein. In addition, in accordance with *Article I* of the Plan, any term used in the Plan or this Third Modification that is not defined in the Plan or this Third Modification, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning ascribed to such term in the Bankruptcy Code or the Bankruptcy Rules.

(whether or not diagnosable before Confirmation of this Plan) caused or allegedly caused, in whole or in part, directly or indirectly, by asbestos or asbestos-containing products and arising or allegedly arising, directly or indirectly, from acts or omissions of either of the Debtors or their respective Affiliates or subsidiaries (other than Austin or any Austin Subsidiaries) (or another person, firm, corporation, or other entity for or with which either of the Debtors or their respective Affiliates or subsidiaries [other than Austin or any Austin Subsidiaries] is or may be liable, including, without limitation, any Claim, including any Contribution Claim, debt, obligation, or liability for compensatory damages, including, without limitation, loss of consortium, proximate, consequential, general and special damages, punitive damages, reimbursement, indemnity, warranty, contribution, and subrogation; *provided, however*, that the Asbestos Disease Claims do not include worker's compensation or other statutory Claims for compensation by an employee against an employer, Asbestos Property Damage Claims and NGC Environmental Claims); and *provided further*, that Asbestos Disease Claims as used herein may include Unknown Asbestos Disease Claims that are not *'Claims'* within the meaning of section 101(5) of the Bankruptcy Code."

2. ***Article I*** of the Plan is hereby modified to add the following ***Sections 1.58(a)*** and ***1.58(b)*** thereto:

"1.58(a) *'Current Asbestos Disease Claim'* means any Asbestos Disease Claim of a Current Asbestos Disease Claimant."

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"1.58(b) *'Current Asbestos Disease Claimant'* means any Person (1) who has (A) been exposed to asbestos or asbestos-containing products of NGC before the Confirmation Date and (B) suffered an injury, as of the Confirmation Date, which is cognizable under applicable non-bankruptcy law in any appropriate non-bankruptcy jurisdiction as a result of such exposure or (2) who has a Contribution Claim resulting from the matters described in *clause (1)* above."

3. Section 1.105 of the Plan is hereby modified to read in its entirety as follows:

"1.105 *'Legal Representative'* means Daniel M. Phillips, or his successor, appointed by the Bankruptcy Court, by an Order entered April 14, 1992."

4. Section 1.176 of the Plan is hereby modified to read in its entirety as follows:

"1.176 *'Reorganized NGC'* means NGC, on and after the Effective Date.

5. Section 1.177 of the Plan is hereby modified to read in its entirety as follows:

"1.177 *'Reorganized NGC Assets'* means all assets, property, interests, and rights of Reorganized NGC, including the Insurance Policies, the Asbestos Insurance Debtor Actions, the Retained Debtor Actions, the Existing Austin Common Stock, and all other claims, causes of action, and demands of the Debtors against

any Person related to or arising from any of the Asbestos Claims (*exclusive, however,* of the NGC Sale Assets, and all other assets and properties which may be vested in New NGC, from time to time, after the Effective Date), together with the income, dividends, and proceeds, if any, derived from the assets, properties, interests, and rights vested in Reorganized NGC."

6. Section 1.193 of the Plan is hereby modified to read in its entirety as follows:

"1.193 *'Unknown Asbestos Disease Claimant'* means any Person: (a) who: (1) has been exposed to asbestos or asbestos-containing products of NGC before the Confirmation Date but who has not suffered, as of the Confirmation Date, an injury which is cognizable under applicable non-bankruptcy law in any appropriate non-bankruptcy jurisdiction as a result of such exposure, or (2) has not been exposed to asbestos or asbestos-containing products of NGC before the Confirmation Date but who will be so exposed and will suffer an injury which will be cognizable under applicable non-bankruptcy law in any appropriate non-bankruptcy jurisdiction as a result of such exposure at some point after the Confirmation Date; or (b) who has a Contribution Claim resulting from the matters described in *clause (a)* above."

7. Sections 2.2 and ***4.3*** of the Plan are hereby modified to clarify that Class 9 consists of Current Asbestos Disease Claims.

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8. Section 5.2(a) of the Plan is hereby modified to read in its entirety as follows:

"(a) *Merger*. The Confirmation Order shall authorize the Merger of Aancor with and into NGC on the Effective Date, and, thereafter, Reorganized NGC will be the surviving corporation; *provided however*, that Reorganized NGC shall have no liability for any Claims asserted against Aancor or NGC, other than Asbestos Claims. To effect the Merger, Aancor and NGC shall take such actions as shall be required by their corporate charters and by-laws and by the applicable laws in the jurisdiction in which they were incorporated."

9. Article V of the Plan is hereby modified to add the following ***Section 5.32***:

"5.32 *Allocation of Tax Refunds and Liabilities*. On the Effective Date, New NGC, Reorganized NGC and Austin shall enter into a tax allocation and sharing agreement acceptable to all such parties and the Bankruptcy Court, which agreement shall allocate all tax refunds and liabilities related to or arising from the filing of consolidated tax returns by the Debtors and the Debtors' Subsidiaries."

10. Section 6.5 of the Plan is hereby modified to read in its entirety as follows:

"6.5 *Injunctions and Channelling Order*.

(a) *Injunction and Channelling Order*. Except as otherwise expressly provided in this Plan, the

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Confirmation Order will provide that: (1) all Persons who have held, hold or may hold Claims, including, without limitation, Current Asbestos Disease Claims and Asbestos Property Damage Claims, or who have held, hold or may hold Existing Aancor Common Stock or Existing NGC Securities, and (2) the Debtors, New NGC, Reorganized NGC, Austin, and any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries are permanently enjoined on and after the Confirmation Date from: (A) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Claim or Interest; (B) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person with respect to any such Claim or Interest; (C) creating, perfecting or enforcing any encumbrance

of any kind against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; (D) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; and (E) any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of this Plan, the Plan Documents, or the NGC Asbestos Settlement Fund Documents; *provided, however,* that such injunction shall not impair (1) the rights of Persons with Current Asbestos Disease Claims and Asbestos Property Damage Claims to assert such Claims against the NGC Asbestos Settlement Fund or against Reorganized NGC, if necessary, in accordance

with the NGC Asbestos Claims Resolution Procedures or (2) the rights of Reorganized NGC, New NGC, or the Fund Administrators, as the case may be, to prosecute any Debtor Action, Insurance Debtor Action, or Asbestos Insurance Debtor Action. This injunction will not apply to Unknown Asbestos Disease Claims."

(b) *Channelling Order Regarding Unknown Asbestos Disease Claims*. Except as otherwise expressly provided in this Plan, the Confirmation Order will provide that (1) all Persons who have held, hold or may hold Unknown Asbestos Disease Claims are made beneficiaries of the NGC Asbestos Settlement Fund and, pending exhaustion of the remedies of that Fund to resolve Unknown Asbestos Disease Claims, and (2) the Debtors, New NGC, Reorganized NGC, Austin, and any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries are enjoined on and after the Confirmation Date from: (A) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Unknown Asbestos Disease Claim against the Debtors, New NGC, or Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Unknown Asbestos Disease Claim; (B) the enforcement, attachment, collection or

recovery by any manner or means of any judgment, award, decree, or order against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person with respect to any such Unknown Asbestos Disease Claim; (C) creating, perfecting or enforcing any encumbrance of any kind against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Unknown Asbestos Disease Claim; (D) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Unknown Asbestos Disease Claim; and (E) any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of this Plan, the Plan Documents, or the NGC Asbestos Settlement Fund

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Documents and the liability of the Debtors with regard to such Unknown Asbestos Disease Claims shall be channelled and limited to the NGC Asbestos Settlement Fund and the NGC Asbestos Settlement Fund Assets; *provided, however,* that such channelling order shall not impair the rights of Persons holding or who may in the future hold Unknown Asbestos Disease Claims to assert such Unknown Asbestos Disease Claims against the NGC Asbestos Settlement Fund or against Reorganized NGC, if necessary, in accordance with the NGC Asbestos Claims Resolution Procedures."

11. Sections 6.8(a) and ***(c)*** of the Plan are hereby modified to read in its entirety as follows:

"(a) *'Release.'* Payments and distributions received hereunder by Claimants holding Claims against and Interestholders holding Interests in the Debtors shall not be subject to disgorgement, reallocation or challenge in respect of any alleged LBO Action. On the Effective Date, the Debtors (whether as debtors, debtors in possession or on behalf of Claimants or Interestholders), subject to Bankruptcy Court approval and the provisions of *Section 6.8(c)* below, all Persons asserting claims, demands, or causes of action or who may in the future assert claims, demands, or causes of action derivatively or otherwise through, or on behalf of, any of the Debtors (herein collectively called the *'Releasors'*) shall be deemed, for good and valuable consideration, to have released and discharged any and all past and present holders of the Existing NGC Debt Securities, past and present holders of the Existing Aancor Common Stock,

and past and present holders of any common stock of NGC (herein collectively called the *'Released Parties'*) from any and all LBO Actions that the Releasors (whether directly or on behalf of Claimants), or any Person claiming derivatively or otherwise through, or on behalf of, any of the Releasors, ever had, now has, or hereafter can, shall or may have against any of the Released Parties, arising from, or in connection with or related in any way to, the LBO or any merger, transaction or other activity or conduct engaged in or undertaken in connection with, the LBO, including, without limitation: (1) the offer, sale, purchase or resale of any securities of NGC or Aancor, or any registration statement, preliminary prospectus, prospectus, disclosure or omission related thereto; (2) any extension, supplementation or restructuring of the indebtedness of any of the Debtors, including any breach of duty owed to any of the Debtors arising from any extension, supplementation or restructuring of that indebtedness; (3) any engagement or role of, or services rendered by, any or all of the Released Parties in connection with any of the foregoing; (4) actions taken or not taken by the Released Parties in connection with the Debtors' pre-petition indebtedness; and (5) any claim or demand made, cause of action asserted, or matter alleged in any LBO Action."

"(c) *'Consent to Release of LBO Actions Against Non-Debtor Released Parties'*. Notwithstanding anything to the contrary contained in *Section 6.8(a)* of this Plan, the release of the LBO Actions which have been or may be asserted against any Person, including, without limitation, the Released Parties and all other Persons

against whom any LBO Action may be asserted by reason of such Person's connection with, involvement or participation in, or receipt of fees or benefits of any kind from, the LBO, other than the Debtors (such third parties being herein called the *'Non-Debtor Released Parties'*), by Persons other than the Debtors are to be made solely on a contractual release basis and not by court injunction or discharge of the Debtors pursuant to sections 524 and 1141 of the Bankruptcy Code. Only those Persons who consent to release the Non-Debtor Released Parties by affirmatively checking the *'I CONSENT TO RELEASE'* box on the ballot provided to them to accept or reject this Plan shall have been deemed to have contractually released the Non-Debtor Released parties from the LBO Actions which such Persons have asserted or may assert against any of the Non-Debtor Released Parties. A vote to accept or reject this Plan is independent from the contractual release of the Non-Debtor Released Parties under *Section 6.8(a)* hereof. A vote to *'accept'* this Plan by any Claimant does not of itself constitute a release by any Person (other than the Debtors) of any LBO Action which it has asserted or may assert against any of the Non-Debtor Released Parties."

12. Section 8.1 of the Plan is hereby modified to read in its entirety as follows:

"8.1 *Jurisdiction*. Until the Reorganization Cases are closed, the Bankruptcy Court shall retain the fullest and most extensive jurisdiction that is permissible, including that necessary to ensure that the purposes and intent of this Plan are carried out and to hear and determine all

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Claims set forth in *Article II* of this Plan that could have been brought before the entry of the Confirmation Order (other than the Retained Debtor Actions and the Asbestos Insurance Debtor Actions, which shall be brought by Reorganized NGC or the NGC Asbestos Settlement Fund, as the case may be, pursuant to *Section 5.4* hereof). Except as otherwise provided in this Plan, the Bankruptcy Court shall retain jurisdiction to hear and determine all Claims against the Debtors and to adjudicate and enforce the Debtor Actions and all other causes of action which may exist on behalf of the Debtors. Nothing herein contained shall prevent New NGC from taking such action as may be necessary in the enforcement of any Debtor Action, Insurance Debtor Action, or other cause of action which may exist on behalf of the Debtors and which may not have been enforced or prosecuted by the Debtors, which Debtor Action, Insurance Debtor Action, or other causes of action shall survive Confirmation of this Plan and shall not be affected thereby except as specifically provided herein."

13. Paragraph VI.D. of ***Exhibit A*** to the Plan is hereby modified to read in its entirety as follows:

"In determining the value of any claim, punitive damages shall not be considered or allowed, notwithstanding their availability in the tort system, except as arising in any action or cause of action where Applicable Law is determined to be the Alabama Wrongful Death Statute; excluding, however, damages based on wanton, reckless, gross, outrageous or intentional misconduct or acts. The

only causes of action recoverable under the Alabama Wrongful Death Statute pursuant to this plan are negligence, product liability (the Alabama Extended Manufacturer's Liability Doctrine) and breach of warranty. No jury or court shall be allowed to impose a multiplier for punitive damages against the Trust for these causes of action under the Alabama Wrongful Death Act. The NGCA Fund shall not pay pre-judgment interest, post judgment interest, interest on deferred payments, or any other type of interest on an ADC."

14. ***Exhibit 3*** to ***Exhibit A*** to the Plan is hereby modified to include Dr. Harold Edwards as an Approved Laboratory pursuant to the APDC Procedures.

15. ***Exhibit F*** to the Plan is hereby modified as follows:

(a) By amending the Prepetition Balance for the Connecticut General Life Insurance Company Group Annuity Contract GA – 2002-10994, as set forth at the top of page 9 of ***Exhibit F*** to the Plan, from -0- to $152,407.57; and

(b) By deletion of the License Agreement with Centex American dated as of September 7, 1983, described in the section for Technical Contracts on page 12 of ***Exhibit F*** to the Plan.

Appendix B

DATED as of March 5, 1993

NATIONAL GYPSUM COMPANY,
a Delaware corporation

By: /s/ Edward A. Porter
Edward A. Porter, Vice President-Administration, General Counsel and Secretary

AANCOR HOLDINGS, INC.,
a Delaware corporation

By: /s/ Edward A. Porter
Edward A. Porter, Vice President-Administration, General Counsel and Secretary

JOHNSON & GIBBS,
a Professional Corporation
100 Founders Square
940 Jackson Street
Dallas, Texas 75202-4499
(214) 977-9107

By: /s/ Boe W. Martin
Boe W. Martin

COUNSEL TO NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

APPENDIX C — ASSETS PURCHASE AGREEMENT DATED JULY 1, 1993

ASSETS PURCHASE AGREEMENT

(This Assets Purchase Agreement constitutes the "Assets Purchase Agreement" as defined in Section 1.31 of the Plan)

ASSETS PURCHASE AGREEMENT (this "Agreement"), dated as of July 1, 1993 ("Closing Date"), among Asbestos Claims Management Corporation, a Delaware corporation formerly named National Gypsum Company ("Seller"), National Gypsum Company, a Delaware corporation formerly named New NGC, Inc. ("Buyer"), and The Austin Company, an Ohio corporation ("Austin") that is a wholly owned subsidiary of Seller.

WHEREAS, on October 28, 1990, Seller and Aancor Holdings, Inc., a Delaware corporation (collectively the "Debtors"), filed petitions for reorganization under the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), and thereby commenced the Chapter 11 cases ("Cases") entitled *In re National Gypsum Company* and *In re Aancor Holdings, Inc.*, Case Nos. 390-37213-SAF/11 and 390-37214-SAF/11, respectively. Debtors filed in the Bankruptcy Court a First Amended and Restated Joint Plan of Reorganization dated September 4, 1992 ("September 4th Plan"), which September 4th Plan was approved for solicitation on September 4, 1992.

WHEREAS, the Bankruptcy Court has confirmed the September 4th Plan by order entered March 9, 1993

(as confirmed, together with any and all modifications through the date hereof, the "Plan"); and

WHEREAS, the Plan provides for the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby; and

WHEREAS, pursuant to the Plan, Buyer wishes to acquire, and Seller wishes to convey to Buyer, certain assets of Seller on the terms and conditions set forth in this Agreement and in the Plan; and

WHEREAS, capitalized terms used but not defined herein and defined in the Plan shall have their respective meanings as defined in the Plan; and

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein set forth, the parties hereto agree as follows:

ARTICLE 1

TRANSFER OF ASSETS

1.1 *Transfer of Assets*. Upon the terms and subject to the conditions of this Agreement, Seller hereby conveys, assigns, transfers and delivers to Buyer, and Buyer hereby accepts and takes from Seller, all of Seller's right, title, and interest in and to any and all of Seller's assets other than the Excluded Assets ("Acquired Assets"). The Acquired Assets shall include without limitation the New NGC Operating Cash Fund, NGC's Debtor Actions and Insurance Debtor

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Actions, all of NGC's rights, title, and interests in and to the Binnings Option, all of NGC's interests as a shareholder in all active and inactive subsidiaries of NGC (other than Austin and Austin's subsidiaries), and, subject to the terms and conditions of Section 365 of the Code, all of Seller's rights under all unexpired leases and executory contracts that are assumed by Seller pursuant to the provisions of the Plan or during the pendency of the Cases pursuant to a Final Order of the Bankruptcy Court entered in the Cases (but excluding those leases and executory contracts that constitute Excluded Assets).

Seller shall convey to Buyer the Acquired Assets (i) pursuant to an instrument or instruments in such form or forms as may be filed of record in accordance with the conveyance and recording laws of the applicable jurisdiction with respect to those Acquired Assets of the type that the conveyance of an interest therein appropriately may be filed of record in accordance with such laws, which instrument shall be in form sufficient to defeat competing claims of bona fide purchasers for value without notice and (ii) free and clear of all Liens, Claims, Interests, and other liabilities, duties, obligations, options, charges, liens, security interests, infringements, and other burdens, encumbrances and interests thereon or thereagainst of whatever type or description, (collectively, "Encumbrances"), other than such Encumbrances to the extent affecting the Acquired Assets and not otherwise resolved, released, or otherwise terminated pursuant to the Plan or by Final Order of the Bankruptcy Court, including without limitation Liens on Acquired Assets to the extent securing Secured Claims (collectively, "Remaining Liens"); provided, however, that, notwithstanding the provisions of

this Section 1.1, Seller is not making, and nothing in this Agreement shall be construed as, any representations or warranties to Buyer as to the state, condition, or existence of Seller's rights, title, or interests in or to any of the Acquired Assets, except as expressly set forth in the general warranty deeds and assignments of leases conveying Acquired Assets that constitute real property interests, and any claim, cause of action, or demand with respect to the state, condition, or existence of any rights, title, or interests in or to any of the Acquired Assets, including without limitation any claim, cause of action, or demand for failure to deliver the Acquired Assets free and clear of all Encumbrances other than Remaining Liens, shall be limited in accordance with the provisions of Section 4.1(c) and 4.2 hereof.

1.2 *Assets*. As used herein and in any Schedule hereto, "assets" shall mean all properties, assets, leaseholds, contract rights, privileges, authorities, rights, interests and claims, real and personal, tangible and intangible, of every type and description.

1.3 *Excluded Assets*. Schedule 1.3 identifies the assets of Seller (the "Excluded Assets") that are not included in the Acquired Assets. The Excluded Assets are not being conveyed, transferred, assigned, or delivered to Buyer.

1.4 *Unassignable Assets*. Notwithstanding any other provision of this Agreement, to the extent that any of the Acquired Assets are not assignable or otherwise transferable under the Bankruptcy Code without the consent or waiver of another party thereto or any third party (including any Governmental Unit), or if such assignment or transfer would

constitute a breach thereof or a violation of any applicable law, in each case after giving effect to section 365(f) of the Bankruptcy Code, this Agreement shall not constitute a conveyance, assignment, or transfer (or an attempted conveyance, assignment, or transfer) of, and Seller shall not convey, assign, or transfer, such Acquired Assets until such consent or waiver of such party or parties has been duly obtained or such conveyance, assignment, or transfer has otherwise become lawful. Seller will cooperate with Buyer to obtain the consent or waiver of such other party or parties to such assignment or transfer as promptly as practicable. If and so long as any such consent or waiver shall not have been obtained (and, accordingly, the pertinent asset is excluded from conveyance, assignment, or transfer), Seller will, to the extent such obligations are reasonably capable of performance by Seller, for a period of two years after the Closing Date, use its best efforts to keep such asset in full force and effect and to provide to Buyer or its assignee the benefit of the asset to the same extent as if such asset had been assigned, in which case Buyer shall perform Seller's obligations and shall pay all amounts Seller is obligated to pay with respect to such asset, as if such asset had been assigned. Buyer shall pay, or reimburse Seller for, one hundred percent (100%) of Seller's direct costs, fees and expenses (including reasonable attorneys' and other professionals' fees and expenses) actually incurred by Seller in fulfilling its obligations under this Section 1.4, within 30 days following Seller's submission of an itemized invoice therefor to Buyer. All sums owing under such invoices shall bear interest at the rate of ten percent (10%) per annum beginning sixty (60) days after the submission thereof by Seller to Buyer until paid.

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ARTICLE 2

CONSIDERATION FOR TRANSFER OF ACQUIRED ASSETS

In consideration for Seller's conveyance, assignment, transfer, and delivery to Buyer of the Acquired Assets, Buyer shall perform its obligations as hereinafter set forth in this Article 2.

2.1 *Assumption of Certain Obligations.*

(a) *Assumption.* Except as expressly excluded pursuant to Section 2.1(b) hereof, from and after the Closing Date Buyer hereby assumes, covenants to pay, perform, observe the terms of, satisfy and/or discharge if, as, when, and to the extent due in accordance with the terms thereof, all liabilities and obligations of Seller, whether known or unknown, fixed or contingent, direct or derivative, matured or unmatured, arising from or in any way related to acts, events, omissions, facts or circumstances existing or occurring on or before the Closing Date or otherwise relating to the business or operations of Seller conducted on or before the Closing Date, except to the extent, and only to the extent, such liabilities and obligations are discharged or otherwise disallowed, resolved, terminated, or barred by a Final Order of the Bankruptcy Court in connection with the confirmation of the Plan (individually an "Assumed Liability" and collectively "Assumed Liabilities"), including without limitation the following:

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(i) Certain Obligations under the Plan.

(A) all NGC Current Obligations;

(B) all obligations to fund the Asbestos Fund Expenses Commitment;

(C) all of the liabilities and obligations of Debtors under the Plan as and to the extent provided in Section 5.2(d) of the Plan; and

(D) all liabilities and obligations of Debtors to indemnify officers and directors of Debtors as and to the extent required under Section 7.5 of the Plan.

(ii) *Leases and Executory Contracts.* All liabilities and obligations of Seller under all unexpired leases and executory contracts that are assumed by Seller pursuant to the provisions of the Plan or during the pendency of the Cases pursuant to an order or orders of the Bankruptcy Court entered in the Cases at or prior to Confirmation.

(iii) *Employee Benefit Obligations.* All liabilities and obligations of Seller under all NGC Employee Benefit Plans.

(iv) *Litigation.* All liabilities and obligations of Seller under or related to any litigation or proceedings to the extent any such litigation or proceedings relate to any actual or alleged act, event, or omission occurring by or at the direction of Seller, or otherwise relate to the

business or operations of Seller, before the Closing Date, including without limitation any costs or attorneys' fees assessed against Seller in any such litigation or proceeding before or after the Closing Date.

(v) *Post-Closing Obligation*. All liabilities and obligations that become due and performable after the Closing Date and relate to, or otherwise come into existence as a result of any act, event, or omission that occurs during, any period after the Closing Date with regard to the Acquired Assets (including all assets of Seller that are not transferred as part of the Acquired Assets on the Closing Date pursuant to Section 1.4 hereof).

(b) *Exclusions to Assumptions*. Notwithstanding anything contained in this Section 2.1 to the contrary, Buyer shall not assume, covenant to pay, perform, observe the terms of, satisfy and/or discharge any liability or obligation of Seller to the extent such liability and obligation:

(i) relates to Asbestos Claims;

(ii) arises as a result of any act, event, or omission by, or otherwise relates to the business or operations of, Austin or any of its subsidiaries before or after the Closing Date;

(iii) arises with respect to any Excluded Assets (which do not include the assets of Seller that are not transferred as part of the Acquired Assets on the Closing Date pursuant to Section 1.4 hereof), including without

limitation the Stonewall Litigation, and relates to any period after the Closing Date (for purposes of this clause (iii), all liabilities and obligations relating to costs and expenses (including attorneys' fees) of any party other than Seller for which Seller may be held liable, and all damages assessed against or recoveries denied Seller, with respect to the Stonewall Litigation shall be deemed excluded from Buyer's assumption by this clause (iii));

(iv) is to be otherwise disposed of, discharged, or satisfied pursuant to any other written agreement approved by the Bankruptcy Court and entered into by Buyer and/or Seller (and other parties, if applicable) in connection with the consummation of the transactions contemplated under the Plan, including without limitation the Settlement Agreement dated as of July 15, 1992, among Debtors and the United States of America, and the Second Settlement Agreement among Debtor and the United States of America as filed with the Bankruptcy Court on November 25, 1992 (collectively, the "Environmental Agreements"); provided, however, that Buyer shall be responsible for the performance of Seller's express obligations or duties under any and all such agreements except to the extent otherwise excluded pursuant to any other clause of this Section 2.1(b);

(v) relates to tax liabilities of Aancor, Seller, or Austin, except as provided in the Tax Agreement (hereinafter defined);

(vi) arises under the National Gypsum Company Salaried Employees Retirement Plan, except as provided in the Pension Plan Agreement (hereinafter defined);

(vii) relates to liabilities and obligations of Seller under the NGC Employee Benefit Plans to current and former employees of Austin and its subsidiaries, except to the extent such liabilities and obligations relate to time periods before the Closing Date during which such employees were employed by Seller or any of its subsidiaries other than Austin or any of its subsidiaries; or

(viii) relates to that certain proceeding styled *Armstrong World Industries, Inc., American Olean Tile Company, Inc., and Armstrong World Industries Canada Ltd. v. National Gypsum Company* ("Armstrong Litigation"), except for all costs and expenses (including attorneys' fees) incurred in defending the Armstrong Litigation after the Closing Date.

All such liabilities and obligations of Seller set forth in clauses (i) through (viii) of this Section 2.1(b) herein are referred to collectively as the "Excluded Liabilities".

(c) *No Admission of Liability.* This Section 2.1 sets forth the liability for the Assumed Liabilities and Excluded Liabilities as between Buyer and Seller, and nothing contained in this Agreement shall be, or shall be construed to be, an admission or acknowledgement of the validity, legality, or enforceability of, or, except as between Buyer and Seller, liability for, any Assumed Liability or Excluded Liability; and, further, neither the assumption nor exclusion by Buyer of any liability or obligation pursuant to this Section 2.1 shall impair or otherwise affect the right or ability of Buyer or any other Person to assert or contest the validity, legality, or enforceability of, or, except as between Buyer and Seller, liability for, any such liability or obligation.

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2.2 *Assumption of Additional Obligations.* In addition to the liabilities and obligations assumed by Buyer pursuant to, Section 2.1 hereof, from and after the Closing Date, Buyer shall assume and pay when due all obligations and liabilities assumed by Buyer, or for which Buyer otherwise is liable, pursuant to (i) that certain Transfer of Pension Plan Assets and Assumption of Pension Plan Liabilities Agreement dated July 1, 1993, between Seller, Buyer, Austin, the Legal Representative, and the Asbestos Committee ("Pension Plan Agreement"); (ii) that certain Tax Agreement dated July 1, 1993, between Seller, Buyer, and Austin ("Tax Agreement"); and (iii) any Final Order of the Bankruptcy Court entered with respect to the Cases.

2.3 *Issuance of Common Stock. Warrants and New NGC Senior Notes in Accordance with the Plan.*

(a) At the Closing, Buyer shall issue a certificate or certificates representing an aggregate of 20,000,000 shares of New NGC Common Stock and shall deliver such certificate or certificates to the Disbursing Agent for its distribution thereof pursuant to the terms of the Plan.

(b) At the Closing, Buyer shall issue the New NGC Warrants evidencing the right to purchase an aggregate of 2,234,000 shares of New NGC Common Stock and shall deliver such New NGC Warrants to the Disbursing Agent for its distribution thereof pursuant to the terms of the Plan.

(c) At the Closing, Buyer shall issue the New NGC Senior Notes in the aggregate principal amount of $100,000,000 and shall deliver such New NGC Senior

Notes to the Disbursing Agent for its distribution thereof pursuant to the terms of the Plan.

2.4 *Limitation on Liabilities Assumed by Buyer.* Except for the obligations and liabilities of Seller assumed by Buyer pursuant to Section 2.1 of this Agreement, the Pension Plan Agreement, and the Tax Agreement, and as otherwise required under any Final Order of the Bankruptcy Court, Buyer does not hereby assume, and shall not be deemed to have assumed, any liabilities or obligations of Seller of any kind or nature, known, unknown, contingent, or otherwise, by reason of any theory of law or equity.

ARTICLE 3

ACCOUNTING ADJUSTMENTS

3.1 *Closing Date Accounting.*

(a) On the Closing Date, Seller shall deliver to Austin an accounting ("Closing Date Accounting"), as of a date as close to the Closing Date as practicable ("First Accounting Date"), of:

(i) all amounts then payable by Austin to Seller as reimbursement of (A) group welfare benefits paid with respect to Austin, its subsidiaries, and/or their employees ("Paid Claims") and (B) premiums or similar amounts paid by Seller on behalf of Austin or any of its subsidiaries ("Paid Premiums") for any insurance policies (including pension plan fiduciary liability and director and officer liability insurance) and/or other

medical, welfare, or other benefit plans maintained with respect to Austin, its subsidiaries, their properties, or their employees ("Austin Benefits");

(ii) all other amounts then payable by Austin to Seller as reimbursement for expenses paid by Seller on behalf of Austin or any of its subsidiaries ("Paid Expenses"), to the extent not accounted for under clause (i) of this Section 3.1(a);

(iii) all (A) Austin Benefits cancelled or otherwise terminated as of the First Accounting Date and prior to the expiration of any periods for which Paid Premiums theretofore had been paid by Seller and (B) Paid Premiums, if any, refunded to Seller ("Refunded Premiums") as of the First Accounting Date with respect to such cancelled or terminated Austin Benefits; and

(iv) all amounts paid to Seller on or before the First Accounting Date by the employees of Austin (or any of its subsidiaries) or by Austin on behalf of employees of Austin (or any of its subsidiaries) for remittance by Seller to the appropriate group life, health, disability, and other employee benefit welfare plans or insurance carriers providing benefits or coverage for such employees ("Austin Employee Benefits") that have not been remitted by Seller to the appropriate Austin Employee Benefits, or that have been refunded to Seller by any such Austin Employee. Benefits, as of the First Accounting Date ("Held Employee Funds").

(b) On the Closing Date, (i) if the sum of Paid Claims, Paid Premiums, and Paid Expenses reflected in the Closing

Date Accounting exceeds the Refunded Premiums reflected in the Closing Date Accounting, then Austin shall pay to Seller the amount of such excess and (ii) if the Refunded Premiums reflected in the Closing Date Accounting exceeds the sum of Paid Claims, Paid Premiums, and Paid Expenses reflected in the Closing Date Accounting, then Seller shall pay to Austin the amount of such excess.

(c) On, or within two days after, the Closing Date, Austin shall provide to Seller written instructions as to the distribution by Seller of the Held Employee Funds and the Held Employee Funds shall be distributed by Seller within 30 days after the Closing Date in accordance with such instructions to the extent the instructed distribution is not in violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"); provided that if no written instructions are provided to Seller as provided herein, or to the extent the distribution(s) instructed by such written instructions would violate ERISA, Seller shall deliver within 30 days after the Closing Date the Held Employee Funds to the party originally delivering such funds to Seller to the extent determinable and, to the extent not determinable, shall deliver such Held Employee Funds to Austin and, to the extent any such Held Employee Funds are delivered to Austin in accordance with this Section 3.1(c), Austin agrees to hold and dispose of such funds in accordance with the applicable provisions of ERISA.

3.2 *Post Closing Adjustments.*

(a) Within 120 days after the Closing Date Buyer shall deliver to Austin a second accounting ("Second Accounting"),

as of a date ("Second Accounting Date") that is at least 90 days after the Closing Date, of:

(i) all Paid Claims and Paid Premiums, if any, with respect to the Austin Benefits paid after the First Accounting Date and for which Seller was not reimbursed on or before the Closing Date and Buyer has not been reimbursed after the Closing Date ("Interim Payments");

(ii) all other amounts then payable by Austin to Seller as reimbursement for expenses paid by Seller on behalf of Austin or any of its subsidiaries, to the extent not accounted for under Section 3.1 hereof or clause (i) of this Section 3.2(a) ("Interim Expenses");

(iii) all (A) Austin Benefits cancelled or otherwise terminated after the First Accounting Date and on or before the Closing Date and prior to the expiration of any periods for which Paid Premiums theretofore had been paid by Seller and (B) Refunded Premiums, if any, refunded to Seller on or before the Closing Date to the extent not reflected in the Closing Date Accounting or to Buyer after the Closing Date with respect to all Austin Benefits so cancelled or terminated as of the Second Accounting Date; and

(iv) all amounts paid to Seller after the First Accounting Date by the employees of Austin (or any of its subsidiaries) or by Austin on behalf of employees of Austin (or any of its subsidiaries) for remittance by Seller to the appropriate Austin Employee Benefits that have

not been remitted by Seller to the appropriate Austin Employee Benefits, or that have been refunded to Seller after the First Accounting Date by any such Austin Employee Benefits, as of the Second Accounting Date ("Post-Accounting Held Employee Funds").

(b) Within five business days after the date of delivery to Austin of the Second Accounting, (i) if the sum of Interim Payments and Interim Expenses reflected in the Second Accounting exceeds the Refunded Premiums reflected in the Second Accounting, Austin shall first apply any such excess against all amounts, if any, that are then owed to Austin pursuant to Section 3.1(b)(ii) hereof and pay the remainder of the excess, if any, to Buyer and (ii) if the Refunded Premiums reflected in the Second Accounting exceeds the sum of Interim Payments and Interim Expenses reflected in the Second Accounting, then Buyer shall first apply any such excess against all amounts, if any, that are then owed to Buyer pursuant to Section 3.1(b)(i) hereof and pay the remainder of the excess, if any, to Austin.

(c) On, or within two days after, the date of delivery to Austin of the Second Accounting ("Delivery Date"), Austin shall provide to Seller written instructions as to the distribution by Seller of the Post-Accounting Held Employee Funds and the Post-Accounting Held Employee Funds shall be distributed by Seller within 30 days after the Delivery Date in accordance with such instructions to the extent the instructed distribution is not in violation of ERISA; provided that if no written instructions are provided to Seller as provided herein, or to the extent the distribution(s) instructed by such written instructions would violate ERISA, Seller

shall deliver within 30 days after the Delivery Date the Post-Accounting Held Employee Funds to the party originally delivering such funds to Seller to the extent determinable and, to the extent not determinable, shall deliver such Post-Accounting Held Employee Funds to Austin and, to the extent any such Post-Accounting Held Employee Funds are delivered to Austin in accordance with this Section 3.2(c), Austin agrees to hold and dispose of such funds in accordance with the applicable provisions o f ERISA.

3.3 *Standard of Accounting.*

All accountings provided pursuant to this Article 3 shall be prepared in accordance with the historical methods and calculations used by Seller in allocating liability for Paid Claims, Paid Premiums, and Paid Expenses to Austin.

3.4 *Additional Payments.*

Notwithstanding the provisions of this Article 3, nothing contained in this Article 3 shall limit or otherwise affect the right of Seller or Buyer to provide to Austin after the First Accounting Date statements reflecting Paid Premiums or Paid Expenses paid before the Closing Date or Paid Claims or Paid Premiums paid before or after the Closing Date, and Austin shall be liable for the payment of such amounts except to the extent otherwise accounted for and paid (or offset against) in accordance with this Article 3.

3.5 *Payments.*

To the extent any payment required to be made pursuant to Sections 3.1(b), 3.2(b), and 3.4 hereof are not paid within

30 days after the due date thereof, such unpaid amounts thereafter shall bear interest at the rate of 10% per annum until paid.

ARTICLE 4

LIMITATION ON REPRESENTATIONS AND WARRANTIES

4.1 *Disclaimer of Warranties of Seller.*

(a) *REAL PROPERTY ASSETS.* SUBJECT TO SECTIONS 4.1(c) and 4.2 HEREOF, THE ACQUIRED ASSETS THAT CONSTITUTE REAL PROPERTY INTERESTS SHALL BE CONVEYED, ASSIGNED, AND TRANSFERRED BY SELLER TO BUYER WITHOUT WARRANTY (EXCEPT TO THE EXTENT EXPRESSLY SET FORTH IN THE APPLICABLE GENERAL WARRANTY DEED OR ASSIGNMENT OF LEASE PURSUANT TO WHICH ANY SUCH ACQUIRED ASSET IS CONVEYED TO BUYER, BUT SUBJECT TO SECTION 4.2 HEREOF), WHETHER EXPRESS, IMPLIED, OR STATUTORY, AS TO THE DESIGN, CONSTRUCTION, HABITABILITY, SUITABILITY FOR OCCUPANCY, CONDITION OR STATE OF REPAIR OF THE ASSET, OR ANY PORTION THEREOF. BUYER ACKNOWLEDGES THAT (EXCEPT TO THE EXTENT EXPRESSLY SET FORTH IN THE APPLICABLE GENERAL WARRANTY DEED OR ASSIGNMENT OF LEASE PURSUANT TO WHICH ANY SUCH ACQUIRED ASSET IS CONVEYED TO BUYER, BUT SUBJECT TO SECTION 4.2 HEREOF): (I) SELLER HAS DISCLAIMED

ALL EXPRESS, IMPLIED, OR STATUTORY WARRANTIES WITH RESPECT TO SUCH ACQUIRED ASSETS, (II) SELLER IS UNDER NO OBLIGATION TO ALTER, REPAIR OR IMPROVE SUCH ACQUIRED ASSETS OR ANY PORTION THEREOF, AND (III) BUYER HAS FULLY INSPECTED AND REVIEWED SUCH ACQUIRED ASSETS, INCLUDING WITHOUT IMPLIED LIMITATION THE PHYSICAL ASPECTS THEREOF AND ALL MATTERS AFFECTING THE OPERATION THEREOF AND SHALL ACCEPT SAME "AS IS, WHERE IS" WITH ALL FAULTS AND DEFECTS. SELLER FURTHER DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AS TO SUCH ACQUIRED ASSETS, OR ANY PORTION THEREOF. SUBJECT TO SECTIONS 4.1(c) AND 4.2 HEREOF, THE CONVEYANCE DOCUMENTS COVERING REAL PROPERTY SHALL REFLECT (BY INCORPORATION BY REFERENCE OR OTHERWISE) THIS DISCLAIMER OF WARRANTIES BY SELLER.

(b) *PERSONAL PROPERTY ASSETS.* SUBJECT TO SECTIONS 4.1(c) AND 4.2 HEREOF, THE ACQUIRED ASSETS THAT CONSTITUTE PERSONAL PROPERTY SHALL BE CONVEYED, ASSIGNED, AND TRANSFERRED BY SELLER TO BUYER "AS IS, WHERE IS" WITH ALL FAULTS AND DEFECTS, AND WITHOUT COVENANT, REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS, IMPLIED, OR STATUTORY. WITHOUT LIMITATION OF THE GENERALITY OF THE FOREGOING, SELLER EXPRESSLY DISCLAIMS AND NEGATES WITH RESPECT TO SUCH ACQUIRED

ASSETS: (I) ANY EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY, (II) ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, OR (III) ANY EXPRESS OR IMPLIED WARRANTY WITH RESPECT TO THE CONDITION, USE, DESIGN, CONSTRUCTION, OR OTHER WARRANTY OF OR WITH RESPECT TO SUCH ACQUIRED ASSETS. SUBJECT TO SECTIONS 4.1(c) AND 4.2 HEREOF, THE CONVEYANCE DOCUMENTS COVERING PERSONAL PROPERTY SHALL REFLECT (BY INCORPORATION BY REFERENCE OR OTHERWISE) THIS DISCLAIMER OF WARRANTIES BY SELLER.

(c) *Title.* Notwithstanding the provisions of Sections 4.1(a) and (b) hereof, and subject to Section 4.2 hereof, all conveyance documents covering Acquired Assets shall provide that Seller is conveying title in and to the Acquired Assets being conveyed by such document free and clear of all Encumbrances other than Remaining Liens ("Clear Title"); provided, however, that in the event Clear Title to any of the Acquired Assets is not in fact conveyed to Buyer, neither Buyer nor any successor or assignee of Buyer's rights or interests in any Acquired Assets (collectively, "Buyer's Successor") shall have any claim, cause of action, or demand against Austin (or its subsidiaries), the NGC Asbestos Settlement Fund ("Trust"), the Asbestos Committee, the Legal Representative or, except as and to the extent permitted in the proviso of this sentence, Seller for failure to deliver Clear Title in or to any Acquired Assets; provided that any such claim, cause of action, or demand may be asserted against Seller with respect to any rights, title, or interests in

or to any Acquired Asset that constitutes a real property interest but any liability of Seller on account thereof shall be limited as provided in Section 4.2 hereof. All conveyance documents covering Acquired Assets shall incorporate by reference the applicable limitations on remedies provided by this Section 4.1(c).

4.2 *Buyer's Remedies.* Notwithstanding the provisions of Section 4.1(a), (b) and (c) hereof, nothing herein shall be deemed to limit any right of Buyer to avail itself of all warranties, if any, applicable to the Acquired Assets and available to Buyer from any person other than Austin (or its subsidiaries), the Trust, the Asbestos Committee, the Legal Representative or, except as and to the extent permitted in the proviso of this sentence, Seller; provided, however, that notwithstanding that all real property interests constituting Acquired Assets are being transferred from Seller to Buyer by general warranty deeds and assignments of leases (or substantially equivalent instruments as are acceptable in the applicable jurisdiction), Buyer's and Buyer's Successor's sole course of action and recovery relating to any failure of Seller to deliver title to any such real property interest as warranted in any such deeds or assignments shall be limited to Seller's recovery from and against (i) any issuer of a title policy covering the applicable Acquired Asset and (ii) any other third party other than Austin, the Trust, the Asbestos Committee, or the Legal Representative ("Other Third Party") on account of a claim of Seller arising against such Other Third Party with respect to any rights; title, or interests in or to any such Acquired Asset; provided, further, that, as express conditions to Buyer and/or Buyer's Successor availing itself of the foregoing exclusive remedy, (a) Buyer

or Buyer's Successor, as applicable, shall pay, or reimburse Seller for, any costs or expenses actually incurred by Seller in defending any claim, cause of action, or demand asserted against Seller pursuant to this Article IV and recovering from and against any issuer of title policies covering such real property interest or Other Third Party on account of any claim of Seller arising or existing with respect to any right, title, or interest in or to any such real property interest and (b) Buyer or Buyer's Successor, as applicable, shall indemnify Seller with respect to any such actions as and to the extent provided in Sections 7.1(c) and 7.1(h) hereof. All conveyance documents covering Acquired Assets that constitute real property interests shall incorporate by reference the limitations on Buyer's remedies contained in this Section 4.2.

ARTICLE 5

FURTHER AGREEMENTS OF THE PARTIES

5.1 *Transfer of Operating Certificates and Licenses.* Buyer and Seller, at Buyer's expense, shall cooperate and use their best efforts to cause Seller's operating certificates, licenses and other authorities to be transferred or reissued to Buyer or its designee as of the Closing.

5.2 *Governmental Filings.* Buyer and Seller, at Buyer's expense, shall cooperate in filing any reports or applications for approval, waiver or consent from any Governmental Unit necessary for the consummation of the transactions contemplated by this Agreement or otherwise considered appropriate by Buyer.

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5.3 *Assurances*. After the Closing, for no further consideration, (i) Seller shall, to the extent reasonably possible, perform all such other actions (including without limitation the use of Seller's best efforts to achieve transfer of registrations, permits, approvals and the like as contemplated by this Agreement) and shall execute, acknowledge, and deliver all such assignments, transfers, consents and other documents as Buyer may reasonably request to vest in Buyer or its designee and to perfect and protect Buyer's or such designee's right, title and interest in and to, and enjoyment of, the Acquired Assets and to otherwise protect Buyer's rights under this Agreement and (ii) Buyer shall, to the extent reasonably possible, similarly perform all such other actions (including without limitation the use of Buyer's best efforts to achieve transfer of registration, permits, approvals and the like to transfer to Seller (or its successor in interest) rights and interests in or to Excluded Assets that inadvertently or mistakenly are transferred to Buyer in connection with the consummation of the transactions contemplated under this Agreement) and shall execute, acknowledge, and deliver all such assignments, transfers, consents, and other documents as Seller may reasonably request to vest in Seller (or its successor in interest) and to perfect and protect Seller's (or such successor's) right, title and interest in and to Excluded Assets or to otherwise protect Seller's rights under this Agreement. In any such case, the party receiving the primary benefit of the action to be taken (by receipt of an asset or as the beneficiary of an assurance) shall bear the costs, expenses (including reasonable attorneys fees), and filing fees incurred by each of Buyer and Seller in effecting such actions.

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5.4 *Transfer Taxes; Transfer and Recording Fees.* Buyer shall pay any and all sales, use, stamp, value-added transfer, recording and other similar taxes (other than income taxes), and any transfer or recording fees or other similar costs incurred or assessed by any federal, state, local or foreign taxing authority (including interest and penalties, if any) in connection with the sale or transfer of the Acquired Assets to Buyer or the transactions contemplated by this Agreement to the extent due and owing and not paid out of the Debtors' estate. Seller will take all reasonable steps requested by Buyer to minimize any taxes, fees or costs referred to in this Section 5.4. Nothing in this Section 5.4 shall constitute either a waiver by Buyer of any of the benefits of Section 1146 of the Bankruptcy Code or an admission by Buyer of its liability or obligation for the payment of any such fees or taxes as against any such taxing authority.

5.5 *Employees.* Seller agrees to make available to Buyer all of Seller's officers, agents, and employees as of the Closing Date. Seller shall assign to Buyer on the Closing Date, as part of the Acquired Assets, all employment agreements between Seller and its officers, agents, and employees that have been assumed by Seller pursuant to Section 365 of the Bankruptcy Code as of the Closing.

5.6 *Books and Records.*

(a) On the Closing Date, Seller shall deliver to Buyer all of its books and records, save and except those related solely to the Excluded Assets or Asbestos Claims which shall be retained by Seller. In the event Seller assigns to Buyer the premises where the books and records relating solely to

the Excluded Assets or Asbestos Claims are located, Buyer shall deliver such books and records to Seller at or after the Closing.

(b) To the extent any books or records, or any information contained therein, delivered by Seller to Buyer pursuant to Section 5.6(a) hereof are subject to any duty of confidentiality by Seller, Buyer hereby agrees to be bound by such duty of confidentiality to the same extent as Seller is so bound, and as between Buyer, Seller, and Austin, Buyer shall be responsible for any breach of any such duty of confidentiality by Buyer or any of its attorneys, employees, agents, or representatives (collectively, to the extent used with respect to any person or entity, "Representatives") occurring after the Closing Date.

(c) Seller and its Representatives shall have the right to have access, during regular business hours upon reasonable notice, to all books and records delivered by Seller to Buyer pursuant to this Agreement to the extent such books and records relate to Excluded Assets or Asbestos Claims and to make copies and extracts therefrom at Seller's expense; provided, however, that Buyer shall not be required to permit Seller or its Representatives to have access to, or otherwise permit copies or extracts to be made of, any information or material that is subject to, or otherwise protected by, legal privileges of or available to Buyer, including without limitation the attorney-client privilege, the work product privilege, the party communication privilege, the joint defense privilege, and any other legal privilege that Buyer, on the advice of its legal counsel, asserts is applicable. Buyer shall maintain such books and records for a period of at least

five years, or longer if required by any applicable law or regulation. Prior to destroying any such books and records, Buyer shall provide Seller 30 days prior written notice so that Seller may have an opportunity to review such books and records and to make copies and extracts therefrom prior to their destruction. After the expiration of such 30 day period, Buyer may dispose of such books and records with no further liability or obligation to Seller.

(d) Any and all books and records, and all information and data contained therein, made available or furnished to Seller or its Representatives pursuant to this Section 5.6, other than such books, records, information, or data to the extent related to Excluded Assets or Asbestos Claims, shall be held in confidence by such persons and such persons shall not disclose any of such books, records, information, or data to any other person or entity and shall not use such books, records, information, or data in any way, directly or indirectly, that is detrimental to Buyer or any of its subsidiaries; provided, however, that this sentence shall not apply to any such information or data that (i) is or becomes generally available to the public other than as a result of a disclosure by Seller or its Representatives, (ii) was within the possession of Seller or its Representatives prior to its being furnished pursuant hereto, provided that such information is not subject to another confidentiality agreement with or other contractual, legal or fiduciary obligation of confidentiality to Buyer or any other party with respect to such information, or (iii) becomes available to Seller or its Representatives on a nonconfidential basis from a source other than Buyer, provided that such source is not bound by a confidentiality agreement with or other contractual, legal or fiduciary

obligation of confidentiality to Buyer or any other party with respect to such information. Prior to complying with this paragraph, Buyer may require Seller and its Representatives to whom any books, records, information, or data is made available or furnished to execute a confidentiality letter in form and substance reasonably satisfactory to Buyer. In any event, Seller shall be responsible for any breach of this Section 5.6(d) or any letter agreement contemplated herein by any party subject hereto or thereto and agrees, at its sole expense, to take all reasonable measures (including but not limited to court proceedings) to restrain unauthorized disclosure or use of the books, records, information, and data made available or furnished pursuant to this Section 5.6.

5.7 *Agreements Regarding Certain NGC Employee Benefit Plans*. On the Closing Date, Buyer will assume and continue all NGC Employee Benefit Plans to the extent provided in Section 5.16 of the Plan with respect to current and former employees of Seller (which employees shall not include any current or, unless employed by Seller on the Closing Date, former employees of Austin and its subsidiaries); provided, however, that the National Gypsum Company Salaried Employees Retirement Plan shall be assumed and continued only to the extent and as provided in the Pension Plan Agreement.

5.8 *Compliance with Plan*. Each of Buyer and Seller shall take all such actions and refrain from taking such actions as the Plan shall specify with respect to it.

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ARTICLE 6

THE CLOSING

6.1 *Actions by Seller.* At the Closing, Seller shall deliver to Buyer or its designee the following:

(a) such warranty deeds, bills of sale, assignments or other instruments of transfer and assignment and releases, as are necessary to consummate the sale and transfer of the Acquired Assets to Buyer pursuant to the terms of this Agreement, all in form and substance mutually acceptable to Buyer and Seller (without limiting the generality of this Section 6.1, subject to Section 4.2 hereof, all deeds conveying to Buyer real property as part of the Acquired Assets shall be general warranty deeds in such form and with warranties as strong as are permitted in the applicable jurisdiction);

(b) possession of the Acquired Assets;

(c) the Pension Plan Agreement and the Tax Agreement, each duly executed by each of Seller and Austin; and

(d) such other documents, certificates, or statements as Buyer shall reasonably request in connection with this Agreement or the Plan in form and substance mutually acceptable by Buyer and Seller.

Notwithstanding the form or substance of any instrument delivered by Seller to Buyer conveying any of the Acquired Assets to Buyer, Buyer's recourse under any such instruments shall be limited by and subject to the provisions of Section 4.2 hereof.

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6.2 *Actions by Buyer.* At the Closing, Buyer shall:

(a) issue and deliver the New NGC Securities contemplated by Section 2.2 hereof in the manner contemplated by the Plan;

(b) deliver to Seller a Certificate of the Secretary of Buyer, certifying: (i) the Certificate of Incorporation and Bylaws of Buyer, (ii) the adoption of resolutions of the board of directors of Buyer authorizing the execution of this Agreement and the consummation of the transactions and agreements contemplated herein, and (iii) the incumbency and signatures of the officers of Buyer executing this Agreement and the other documents, instruments, agreements, and certificates delivered by Buyer in connection with the consummation of the transactions contemplated under this Agreement;

(c) deliver to Seller the Pension Plan Agreement and the Tax Agreement; and

(d) deliver to Seller such other documents, certificates, or statements as Seller shall reasonably request in connection with this Agreement or the Plan, in form and substance mutually acceptable to Buyer and Seller.

6.3 *Occurrence of Events.* At the Closing, all actions and transactions shall be conducted concurrently, and no actions or transactions shall be deemed to be completed until all actions and transactions to be completed on the Closing Date shall have been completed.

6.4 *Expense of Closing Documents.* All deeds, bills of sale, assignments, certificates, releases, and other agreements and instruments to be delivered at Closing by Seller and Buyer shall be prepared at Buyer's expense.

ARTICLE 7

INDEMNIFICATION

7.1 *Indemnification by Buyer.* Effective as of the Closing, Buyer will indemnify, defend, and hold harmless Seller, the Legal Representative, the Asbestos Committee, the Trust, Austin, and their respective Representatives (as defined in Section 5.6(b) hereof) from, against, and with respect to any claim, liability, obligation, loss, damage, assessment, judgment, cost, expense, action, suit, proceeding or demand, of any kind or character (including but not limited to reasonable attorneys' fees and court costs) (collectively, an "Indemnifiable Claim"), excluding Asbestos Claims, arising out of or as a result of or relating to:

(a) the termination by Seller on or before the Closing Date, or by Buyer after the Closing Date, of any employee that is employed by Seller immediately prior to the Closing;

(b) any claim asserted under Environmental Laws (hereinafter defined), including without limitation those claims that may be asserted under the Environmental Agreements, except to the extent (i) relating to any property owned or operated by Austin or any of its subsidiaries (collectively, the "Austin Group") either before or after the Closing Date, (ii) relating to any property owned or operated

by Seller or the Trust after the Closing Date (except in accordance with Section 1.4 hereof), or (iii) except in the case of an Indemnifiable Claim arising out of or in connection with the operation of Seller's business before the Closing Date or Buyer's business after the Closing Date, arising as a result of any actual or alleged act, event, or omission by or at the direction of the Trust or the Austin Group either before or after the Closing Date or by or at the direction of Seller after the Closing Date (except in accordance with Section 1.4 hereof);

(c) any actual or alleged act or omission by Seller or any of its Representatives occurring in furtherance of Seller's cooperation or participation with, or assistance to, Buyer in commencing, pursuing, or otherwise maintaining any cause of action or other course of recovery against any issuer of any title policies relating to any real property that constitutes part of the Acquired Assets, unless arising as a result of any willful misconduct by Seller, the Trust, the Austin Group, or any of their respective Representatives;

(d) Seller's ownership or operation of any assets that are to be part of the Acquired Assets but that are not transferred to Buyer as provided in Section 1.4 hereof, unless arising as a result of any willful misconduct by Seller, the Trust, the Austin Group, or any of their respective Representatives;

(e) any damages incurred, directly or indirectly, by Seller or the Trust under the Armstrong Litigation, including without limitation the loss of any insurance coverage that would otherwise be available for the payment of Asbestos Claims;

(f) any actual or alleged act, event, or omission by or at the direction of Seller occurring, or the business or operations of Seller as conducted, before the Closing Date, unless (i) arising with respect to any Asbestos Claims or any Excluded Assets; (ii) except in the case of an Indemnifiable Claim arising out of or in connection with the operation of Seller's business before the Closing Date or Buyer's business after the Closing Date, arising as a result of any actual or alleged act, event, or omission by or at the direction of the Trust or the Austin Group either before or after the Closing Date or by or at the direction of Seller after the Closing Date (except in accordance with Section 1.4 hereof), or (iii) Buyer is entitled to indemnification with respect thereto pursuant to Section 7.2 hereof; and

(g) any actual or alleged failure of Buyer to pay, perform, fulfill, or discharge, in accordance with the terms of this Agreement, the Pension Plan Agreement, the Tax Agreement, the Assumed Liabilities or any other debt, liability, obligation, claim, duty, lien or encumbrance assumed by Buyer pursuant to the provisions of this Agreement, the Pension Plan Agreement, the Tax Agreement, or any agreement entered into pursuant to Section 2.1(b)(iv) hereof.

(h) any claim, cause of action, or demand asserted against Seller by Buyer or any successor or assignee of Buyer's rights or interests in any Acquired Asset that constitutes a real property interest with respect to the state, condition, or existence of any right, title, or interest in or to any such Acquired Asset to the extent the amount of any such Indemnifiable Claim exceeds the amount Seller actually recovers from and against any issuer of title policies covering

any such Acquired Asset or from and against any Other Third Party on account of any claim of Seller arising or existing with respect to the state, condition, or existence of any right, title, or interest in or to any such Acquired Asset.

For purposes of this Agreement, the term "Environmental Laws" shall mean, collectively, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.*; the Toxic Substance Control Act ("*TSCA*"), 15 U.S.C. § 2601 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 1802; the Resource Conservation Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 7401 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; any analogous state statutes or local ordinances; and any permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated pursuant to the preceding laws or other similar laws, regulations, rules or ordinances, all as from time to time in effect and as interpreted by the relevant judicial or regulatory authorities enforcing such Environmental Law.

Seller shall be entitled to indemnification for Indemnifiable Claims pursuant to this Section 7.1 notwithstanding any negligence of Seller or its Representatives that may have occurred in connection with, or as part of, any act, event, or omission giving rise to any Indemnifiable Claim under this Section 7.1; and provided, further, that Buyer shall not assert as a defense to Buyer's obligation to indemnify Seller pursuant to this Section 7.1 any negligence of Seller or its Representatives that may have occurred in connection with,

or as part of, any act, event, or omission giving rise to any Indemnifiable Claim of Seller under this Section 7.1.

7.2 *Indemnification by Austin.* Austin will indemnify, defend, and hold harmless Buyer and its Representatives from, against, and with respect to any Indemnifiable Claim arising out of or as a result of or relating to:

(a) any claim asserted under Environmental Laws to the extent (i) relating to any property owned or operated by the Austin Group before or after the Closing Date or (ii) arising as a result of any actual or alleged act, event, or omission by or at the direction of the Austin Group either before or after the Closing Date;

(b) any actual or alleged act, event, or omission by or at the direction of the Austin Group occurring, or the business or operations of the Austin Group as conducted, before or after the Closing Date, unless (i) arising as a result of any actual or alleged act, event, or omission by or at the direction of Buyer or (ii) Buyer is obligated for indemnification with respect thereto pursuant to Section 7.1 hereof; and

(c) any actual or alleged failure of Austin to pay, perform, fulfill or discharge any debt, liability, obligation, claim, duty, lien or encumbrance of Austin or any other member of the Austin Group that is not assumed by Buyer pursuant to this Agreement, the Pension Plan Agreement, the Tax Agreement, or any agreement entered into pursuant to Section 2.1(b)(iv) hereof.

Notwithstanding anything contained in this Section 7.2, Buyer shall not be entitled to any indemnification under this

Section 7.2 for any Indemnifiable Claim related to or arising as a result of any Asbestos Claims. In addition, to the extent Buyer is entitled to indemnification under this Section 7.2, such indemnification claim shall not be satisfied out of any proceeds of Asbestos Insurance Debtor Recoveries. Furthermore, Buyer shall not be entitled to any indemnification from the Trust, whether under this Section 7.2, principles of common law, or otherwise.

7.3 *Conduct of Indemnification Proceedings.* If any action or proceeding (including any governmental investigation) shall be brought or asserted against any party indemnified pursuant to this Article 7 in respect of which indemnification may be sought from an indemnifying party, the indemnified party shall promptly notify the indemnifying party in writing, and the indemnifying party shall assume the defense thereof, including the employment of counsel reasonably satisfactory to the indemnified party and the payment of all expenses. The indemnified party shall have the right to employ separate counsel in any such action and to participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of the indemnified party unless (i) the indemnifying party has agreed to pay such fees and expenses or (ii) the named parties to any such action or proceeding (including any impleaded parties) include both such indemnified party and the indemnifying party, and such indemnified party shall have been advised by counsel that there is a conflict of interest on the part of counsel employed by the indemnifying party to represent such indemnified party or there may be defenses available to the indemnified party that are different from or in addition to those available to the indemnifying party and that the indemnifying party is

not able to assert on behalf of or in the name of the indemnified party (in which case, if such indemnified party notifies the indemnifying party in writing that it elects to employ separate counsel at the expense of the indemnifying party, the indemnifying party shall not have the right to assume the defense of such action or proceeding on behalf of such indemnified party; it being understood, however, that the indemnifying party shall not, in connection with any one such action or proceeding or proceedings in the same jurisdiction arising out of the same general allegations or circumstances, be liable for the fees and expenses of more than one separate firm of attorneys (together with appropriate local counsel) at any time for all such indemnified parties, which firm shall be designated in writing by such indemnified parties). The indemnifying party shall not be liable for any settlement of any such action or proceeding effected without its written consent unless such consent shall be unreasonably withheld, but if settled with such written consent or if such consent shall be unreasonably withheld, or if there be a final judgment for the plaintiff in any such action or proceeding, the indemnifying party agrees to indemnify and hold harmless any indemnified party from and against any loss or liability by reason of such settlement or judgment. To the extent that an indemnifying party shall have paid indemnification to an indemnified party hereunder, then the indemnifying party shall have full rights of subrogation with respect to any claims (whether for indemnification, contribution, or otherwise) that such indemnified party may be entitled to assert against any other person with respect to the subject matter of the indemnification hereunder and any claims for insurance coverage benefits that such indemnified party may be entitled to assert with respect to the subject

matter of the indemnification hereunder; provided, however, that to the extent Buyer recovers any amounts under the Insurance Policies pursuant to the rights granted Buyer in this Section 7.3, all such recovered amounts shall be delivered to Seller or the Trust and Buyer shall direct the carrier of the Insurance Policy under which such amounts are recovered to so deliver such recovered amounts directly to Seller or the Trust for and on behalf of Buyer.

7.4 *Survival of Indemnity.* Neither Buyer nor Austin shall (i) merge with or into any other entity unless the surviving entity shall agree to be bound by the terms and provisions of this Article 7 or (ii) transfer (either directly or indirectly through a subsidiary or in a single transaction or a series of related transactions) all or substantially all of its assets unless the purchasing entity (or entities) of such assets agrees to be bound by the provisions of this Article 7 to the same extent as the transferring entity. The indemnity rights and obligations of Buyer and Austin under Sections 7.1 and 7.2 hereof shall survive and be enforceable by and against any successor or assign of Buyer or Austin succeeding to the rights of either of such entities as contemplated in this Section 7.4

7.5 *No Admission of Liability.* Nothing contained in this Article 7 shall be, or shall be construed to be, an admission or acknowledgement of the validity, legality, or enforceability of, or liability for, any Indemnifiable Claim on which any indemnity under this Article 7 is claimed and the payment of indemnification on account of any such Indemnifiable Claim pursuant to this Article 7 shall not impair or otherwise affect the right or ability of any party to contest the validity,

legality, or enforceability of, or liability for, any such Indemnifiable Claim. In addition, any party that pays indemnification on account of an Indemnifiable Claim pursuant to this Article 7 shall be subrogated to any and all rights that the party receiving such payment may have to challenge or otherwise contest the validity, legality, or enforceability of the Indemnifiable Claim with respect to which indemnification is so paid.

7.6 *NO THIRD PARTY BENEFICIARIES.* THE RIGHTS AND BENEFITS PROVIDED BY THIS ARTICLE 7 SHALL BE FOR THE SOLE AND EXCLUSIVE BENEFIT OF THE PARTIES NAMED IN THIS ARTICLE 7 AS BEING ENTITLED TO INDEMNIFICATION, SHALL NOT BE ASSIGNABLE OR OTHERWISE TRANSFERABLE EXCEPT AS PERMITTED UNDER SECTION 8.7 HEREOF, AND, EXCEPT FOR ASSIGNEES PERMITTED UNDER SECTION 8.7 HEREOF, NO OTHER PARTY OR PARTIES SHALL HAVE OR BE ENTITLED TO ANY RIGHTS OR BENEFITS, INCLUDING WITHOUT LIMITATION THE RIGHT TO ASSERT ANY CLAIM FOR INDEMNIFICATION, UNDER THIS ARTICLE 7.

ARTICLE 8

MISCELLANEOUS

8.1 *Notices.* All notices, requests, demands and other communications under this Agreement shall be in writing and shall be delivered personally (including by courier) or given by facsimile transmission to the parties at the following

addresses (or to such other address as a party may have specified by notice given to the other pursuant to the provisions of this Section 8.1) and shall be deemed given when so received:

(i) if to Buyer, to:

National Gypsum Company
2501 Cedar Springs Road
Suite 700
Dallas, Texas 75201
Attention: Office of the General Counsel
Telecopy No.: (214) 969-3492

With a copy to:

Johnson & Gibbs, P.C.
100 Founders Square
900 Jackson Street
Dallas, Texas 75202-4499
Attention: Boe W. Martin, Esq.
Telecopy No.: (214) 977-9004

(ii) if to Seller or Austin, to:

National Gypsum Company/Asbestos Claims Management Corporation
c/o Gibson, Dunn & Crutcher
1717 Main Street, Suite 5400
Bank One Center
Attention: Stephen C. Johnson, Esquire
Telecopy No.: (214) 698-3400

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and

Asbestos Claims Management Corporation
c/o Gibson, Dunn & Crutcher
1717 Main Street, Suite 5400
Bank One Center
Attention: Stephen C. Johnson, Esquire
Telecopy No.: (214) 698-3400

With a copy to:

Verner, Liipfert, Bernhard, McPherson and Hand
6901 Texas Commerce Tower
600 Travis
Houston, Texas 77002
Attention: Anne M. Ferazzi, Esq.
Telecopy No.: (713) 237-1216

and

Sheinfeld, Maley & Kay, P.C.
1001 Fannin, Suite 3700
Houston, Texas 77002
Attention: Steven A. Buxbaum, Esq.
Telecopy No.: (713) 658-9756

and

Daniel M. Phillips, Esq.
Princeton Forrestal Village
116 Village Blvd., Suite 200
Princeton, New Jersey 08540
Telecopy No.: (609) 520-1702

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and

Stutzman & Bromberg, P.C.
2323 Bryan Street
Suite 2200
Dallas, Texas
Attention: Sander L. Esserman
Telecopy No.: (214) 969-4999

(iii) if to the Trust:

Asbestos Claims Management Corporation
c/o Gibson, Dunn & Crutcher
1717 Main Street, Suite 5400
Bank One Center
Attention: Stephen C. Johnson, Esquire
Telecopy No.: (214) 698-3400

With a copy to:

Verner, Liipfert, Bernhard, McPherson and Hand
6901 Texas Commerce Tower
600 Travis
Houston, Texas 77002
Attention: Anne M. Ferazzi, Esq.
Telecopy No.: (713) 237-1216

and

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Sheinfeld, Maley & Kay, P.C.
1001 Fannin, Suite 3700
Houston, Texas 77002
Attention: Steven A. Buxbaum, Esq.
Telecopy No.: (713) 658-9756

and

Daniel M. Phillips, Esq.
Princeton Forrestal Village
116 Village Blvd., Suite 200
Princeton, New Jersey 08540
Telecopy No.: (609) 520-170[illegible]

and

Stutzman & Bromberg, P.C.
2323 Bryan Street
Suite 2200
Dallas, Texas
Attention: Sander L. Esserm[illegible]
Telecopy No.: (214) 969-499[illegible]

8.2 *Specific Performance.* Each of t[illegible] acknowledges and agrees that the other pa[illegible] be irreparably damaged in the event any of [illegible] this Agreement were not performed in all [illegible] in accordance with their specific terms o[illegible] breached. Accordingly, each of the parties [illegible] the other parties hereto shall be entitled t[illegible] injunctions to prevent breaches of the p[illegible] Agreement and to enforce specifically thi[illegible]

the terms and provisions hereof in any action instituted in any foreign or domestic court having subject matter jurisdiction, to the extent permitted by applicable law.

8.3 *No Waiver.* No failure or delay on the part of any party in exercising any right, power or privilege hereunder or under any of the documents or instruments delivered in connection with this Agreement shall operate as a waiver of such right, power or privilege; nor shall any single or partial exercise of any such right, power or privilege preclude any other or future exercise thereof or the exercise of any other right, power or privilege. Any term or provision of this Agreement maybe waived in writing at any time by the party which is entitled to the benefits thereof.

8.4 *Severability.* If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable, this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance from this Agreement.

8.5 *No Third Party Beneficiary.* Except with respect to the Assumed Liabilities, nothing herein expressed or implied is intended to or shall be construed to confer upon or give to any person or entity other than the parties hereto and their successors or permitted assigns any rights or remedies under or by reason of this Agreement, except that each of the Asbestos Committee, the Trust, the Legal Representative,

and, except to the extent limited under Section 7.6 hereof, their successors and permitted assigns shall be third party beneficiaries of Seller's rights under this Agreement; upon the dissolution of the Asbestos Committee pursuant to the Plan, all rights, powers and remedies of the Asbestos Committee hereunder shall automatically vest in the Trust without further action of any party or order of any court to the extent permitted under applicable law.

8.6 Entire Agreements; Amendments. This Agreement (with its Schedules) and the Plan contain, and are intended as, a complete statement of the entire agreement and understanding among the parties with respect to the subject matter hereof and thereof and, subject to Section 8.10 hereof, supersede all prior statements, representations, discussions, agreements, draft agreements and undertakings, whether written or oral, express or implied, of any and every nature with respect thereto. This Agreement cannot be changed or terminated orally. This Agreement may only be amended by written agreement of each of the parties hereto.

8.7 Assignment. Except for assignments to surviving or acquiring Persons effected in connection with transactions as contemplated in Section 7.4 hereof, Buyer may not assign any of its rights or delegate any of its duties under this Agreement without Seller's prior written consent, and none of Seller, the Asbestos Committee, the Trust, the Legal Representative, or, except for assignments to acquiring persons effected in connection with transactions as contemplated in Section 7.4 hereof, Austin may assign any of their respective rights or delegate any of their respective duties under this Agreement without Buyer's prior written

consent. Any purported assignment in violation of this Agreement shall be null and void *ab initio*.

8.8 *GOVERNING LAW.* THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS; PROVIDED HOWEVER, THAT ALL DEEDS AND CONVEYANCES OF REAL PROPERTY PURSUANT TO THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE IN WHICH SUCH REAL PROPERTY IS LOCATED.

8.9 *Headings; Schedules.* The section headings of this Agreement are for reference purposes only and are to be given no effect in the construction or interpretation of this Agreement. All references herein to Sections and Schedules, unless otherwise identified, are to Sections of, and Schedules to, this Agreement.

8.10 *Interpretation of Agreement.* With respect to any discrepancy between this Agreement and the Plan, the provisions set forth in the Plan shall control.

8.11 *Counterparts.* This Agreement may be executed by the parties hereto in one or more counterparts, each of which shall be deemed to constitute an original, but together which shall be one and the same instrument.

8.12 *Jurisdiction.* The Bankruptcy Court shall retain jurisdiction over this Agreement, including, without limitation, the enforcement, modification and interpretation of its provisions, and for the purpose of determining all

amendments, applications, claims or disputes with respect to this Agreement.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the date first above written.

ASBESTOS CLAIMS MANAGEMENT CORPORATION

By: s/ Edward A. Porter
Name: Edward A. Porter
Title: Vice President

NATIONAL GYPSUM COMPANY

By: s/ Edward A. Porter
Name: Edward A. Porter
Title: Vice President

THE AUSTIN COMPANY

By: s/ J. William Melsop
Name: J. William Melsop
Title: President

Appendix C

Schedule 1.3 to Assets Purchase Agreement

Excluded Assets

1. All rights, titles, and interests of Seller in, to and under that certain Irrevocable Trust Agreement dated as of February 26, 1993, between National Gypsum Company (now named Asbestos Claims Management Corporation), as settlor, and Wachovia Bank of North Carolina, N.A., as trustee, establishing the NGC Irrevocable Trust.

2. Insurance Policies [any and all general liability or property damage insurance policies naming Seller (or any predecessor or Subsidiary), as an insured in effect on or before the Confirmation Date upon which any claim may be made with respect to any Asbestos Claim], including without limitation all such policies issued for policy periods prior to January 1, 1985, and the following policies sold to Seller for policy periods in 1985: American Motorists Insurance Company (No. 3ZM684564-00), Republic Insurance Company (No. CDU16789), and International Insurance Company (No. 522-036890-1).

3. Asbestos Insurance Debtor Actions [all claims, causes of action and enforceable rights of Seller against any Insurance Company, including, without limitation, the Stonewall Litigation, arising from or related to: (a) any such Insurance Company's failure to provide Insurance Coverage for Asbestos Claims under any insurance Policy; (b) the refusal of any Insurance Company to compromise and settle any Asbestos Claims pursuant

to any such Insurance Policy; or (c) the interpretation or enforcement of the terms of any such insurance Policy with respect to Insurance Coverage for Asbestos Claims.]

4. Subject to Buyer's rights under Section 5.1(g) of the Plan, Retained Debtor Actions [those Debtor Actions assertable against: (a) the law firm of Hoyle, Morris & Kerr (including without limitation the litigation relating to or arising from the motion to disqualify filed and prosecuted by the Asbestos Committee against Hoyle, Morris & Kerr) and (b) the R. J. Lee Group, which actions are to be retained and prosecuted by Reorganized NGC pursuant to the Plan.]

5. Existing Austin Common Stock [the shares of the common stock of Austin, $1.00 par value, issued by Austin and outstanding on the Petition Date.]

6. Asbestos Insurance Debtor Action Recoveries [the rights of Seller or Reorganized NGC to any and all proceeds or other relief from: (a) any award, judgment, relief, or other determination entered or made as to any Asbestos Insurance Debtor Action; (b) any and all amounts payable by an Insurance Company under any Asbestos Insurance Settlement Agreement; and (c) any and all proceeds of any Insurance Policy paid or payable to Asbestos Claimants, to the NGC Asbestos Settlement Fund, or to the Asbestos Claims Resolution Facilities, on account of Asbestos Claims.]

7. Reorganized NGC Common Stock [1,000 shares of common stock of Reorganized NGC, $.01 par value, to

be authorized and issued on the Effective Date, pursuant to the NGC Corporate Documents and applicable state law, in the amounts and manner set forth in the Plan.]

8. Subject to Buyer's rights under Section 5.1(g) of the Plan, Retained Debtor Action Recoveries [the Debtor Action Recoveries, if any, resulting from any of the Retained Debtor Actions.]

9. Proceeds of the Asbestos Fund Expenses Commitment [the commitment of Buyer and the Debtors to fund an aggregate sum of $10 million for the purpose of paying the Asbestos Fund Expenses, which sum shall be payable in accordance with Section 5.1(f)(1) of the Plan.]

10. Income, dividends, profits, and proceeds, if any, derived from, or related to, the assets, properties and rights described in items 1 through 9 above.

11. All rights of Seller under the Producers Agreement and the Wellington Agreement (each as defined in the Disclosure Statement), including without limitation the right to participate in the Center for Claims Resolution.

12. Any and all claims, causes of action, demands, enforceable rights and rights of contribution which Seller may have against third parties (other than Buyer) in any way pertaining to, relating to, or arising out of, the facts and circumstances giving rise to Asbestos Claims.

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION ON CONFIRMATION OF THE FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION OF NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC. DATED MARCH 9, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

CASE NO. 390-37213-SAF-11

NATIONAL GYPSUM COMPANY,
a Delaware corporation,

CASE NO. 390-37214-SAF-11

AANCOR HOLDINGS, INC.,
a Delaware corporation,

DEBTORS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CONFIRMATION OF THE FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION OF NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

Appendix D

National Gypsum Company, a Delaware corporation ("*NGC*"), and Aancor Holdings, Inc., a Delaware corporation ("*Aancor*"), the debtors and debtors-in-possession (herein collectively called the "*Debtors*") in the above-captioned chapter 11 bankruptcy cases (the "*Reorganization Cases*"), having proposed their First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. on September 4, 1992 (the "*September 4th Plan*"), and having proposed the Technical Modifications (as hereinafter defined) to the September 4th Plan (the September 4th Plan, as modified by the Technical Modifications and the Confirmation Order, being herein called the "*Plan*")[1], the Court having entered an order (the "*Disclosure Statement Order*") dated September 4, 1992, approving the Disclosure Statement (as hereinafter defined) for the September 4th Plan under section 1125(b) of the Bankruptcy Code; the Court having reviewed the Plan, the Disclosure Statement, memoranda filed in connection with the Confirmation of the Plan and all filed objections and responses to, and statements and comments regarding, the Confirmation of the Plan; the Court having heard the statements of counsel in support of, and in opposition to, the Confirmation of the Plan at a hearing before the Court

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1. Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them in the Plan. The rules of interpretation set forth in ***Article I*** of the Plan shall apply to these Findings & Conclusions. In addition, in accordance with ***Article I*** of the Plan, any term used in the Plan or these Findings and Conclusions that is not defined in the Plan or these Findings & Conclusions, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning assigned to that term in the Bankruptcy Code or the Bankruptcy Rules.

which commenced on December 7, 1992, and concluded on March 9, 1993 (the "*Confirmation Hearing*"); the Court having considered all testimony presented and evidence admitted at the Confirmation Hearing; the Court having taken judicial notice of the papers and pleadings on file in the Reorganization Cases; and the Court finding that *(a)* notice of the Confirmation Hearing and the opportunity of any party in interest to object to the Confirmation of the Plan were adequate and appropriate as to all parties to be affected by the Plan and the transactions contemplated thereby and *(b)* the legal and factual bases set forth in the memoranda filed in these proceedings and the evidence presented at the Confirmation Hearing establish just cause for the relief granted herein; the Court hereby makes the following Findings of Fact and Conclusions of Law ("these *Findings & Conclusions*")[2]:

A. FINDINGS OF FACT

1. ***The Bankruptcy Filings.*** On October 28, 1990, the Debtors filed their Reorganization Cases under chapter 11 of the Bankruptcy Code. By Order entered on October 29, 1990, the Reorganization Cases were administratively consolidated by the Court. Since the filing of the Reorganization Cases, the Debtors have operated their respective businesses and maintained their assets as debtors and debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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2. These Findings & Conclusions constitute the Court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, as made applicable by Bankruptcy Rules 9014 and 7052.

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2. ***The Disclosure Statement/the Plan.*** On April 15, 1992, the Debtors proposed the First Amended and Restated Joint Disclosure Statement (the "*April 15th Disclosure Statement*") for the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. (the "*April 15th Plan*"), which April 15th Disclosure Statement and the April 15th Plan were subsequently modified on June 17, 1992, July 7, 1992, July 30, 1992, September 1, 1992, and September 4, 1992 (the April 15th Disclosure Statement, as so modified, being herein called the "*Disclosure Statement*").

3. ***The Confirmation Hearing.*** Beginning on December 7, 1992, the Court commenced a Confirmation Hearing pursuant to sections 1128 and 1129 of the Bankruptcy Code to consider the Confirmation of the Plan, which Confirmation Hearing was concluded on March 9, 1993.

4. ***Sufficiency of Notice of Confirmation Hearing.*** Notice of the Confirmation Hearing was provided by the Debtors to all parties-in-interest, pursuant to the terms of the Disclosure Statement Order, the Procedures Order (as hereinafter defined), and the Scheduling Order (hereinafter defined).

5. ***Debtors' Representatives at Confirmation Hearing.*** Representatives of the Debtors were present at the Confirmation Hearing.

6. ***Participation of Legal Representative in NGC Reorganization Case.*** On April 14, 1992, the Court entered

an Order (the "*Legal Representative Order*") appointing Daniel M. Phillips (the "*Legal Representative*") to represent persons exposed to NGC asbestos or asbestos containing products prior to confirmation whose identities are unknown to the Debtors and the Asbestos Committee and persons who may be exposed after confirmation (the "*Legal Representative's Constituency*") in the Reorganization Case of NGC (the "*NGC Reorganization Case*"). Since his appointment, the Legal Representative has participated in all applicable phases and proceedings in the NGC Reorganization Case which have affected the rights of the Legal Representative's Constituency (including, without limitation, those members of the Legal Representative's Constituency who are "*Unknown Asbestos Disease Claimants*" as that term is defined in the Plan). Since his appointment, the Legal Representative has received applicable notices, including notice of the confirmation hearing, and has represented the interests of the Legal Representative's Constituency (including, without limitation, those members of the Legal Representative's Constituency who are "*Unknown Asbestos Disease Claimants*", as that term is defined in the Plan) in the NGC Reorganization Case. Persons exposed to NGC asbestos or asbestos containing products prior to confirmation whose identities are unknown, including Unknown Asbestos Disease Claimants who do not hold claims under § 105(5) of the Bankruptcy Code, constitute parties in interest represented by the Legal Representative.

7. ***The Disclosure Statement Order.*** On September 4, 1992, after notice and a hearing, the Court entered the Disclosure Statement Order approving the Disclosure Statement. The Disclosure Statement Order approved the

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Disclosure Statement as containing information of a kind and in sufficient detail, adequate to enable a hypothetical, reasonable investor typical of the Classes of Claimants and Interestholders entitled to vote pursuant to the Plan to make an informed judgment whether to accept or reject the Plan.[3]

8. ***The Procedures Order.*** On September 4, 1992, the Court entered its Order (A) Approving Solicitation Packages, (B) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (C) Approving Forms of Ballots and Ballot Instructions, (D) Establishing Last Date For Receipt of Ballots, and (E) Establishing Procedures for Vote Tabulation (the "*Procedures Order*"). The Procedures Order governed the procedures by which the Debtors were to solicit votes in favor of the Plan and notify Claimants and Interestholders with respect to the Confirmation of the Plan.

9. ***The Scheduling Order.*** On October 21, 1992, the Court entered its Preliminary Scheduling and Pretrial Order for Confirmation Hearing (the "*Scheduling Order*"), which governed the conduct of all parties in connection with the Confirmation Hearing.

10. ***The Disclosure Statement, the Plan and Ballots Distributed.*** Copies of the Disclosure Statement and the Plan with ballots were mailed to all creditors entitled to vote, pursuant to section 1125 of the Bankruptcy Code and Bankruptcy Rule 3017. Certificates of service and/or related affidavits, including, without limitation, affidavits regarding

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3. A minor modification to such Order was entered by agreement of the Debtors, the Asbestos Committee and the Trade and Bond Committee, on September 18, 1992.

notice by publication, were introduced into evidence at the Confirmation Hearing and demonstrated that the Debtors complied with the Procedures Order in all material respects.

11. ***Publication of Disclosure Statement Order.*** Pursuant to the Procedures Order and the Disclosure Statement Order, the Debtors caused a copy of the Disclosure Statement Order to be published in the following newspapers: (a) The Wall Street Journal (national edition); (b) The Dallas Morning News; (c) The New York Times (national edition); and (d) The Charlotte Observer. The Disclosure Statement Order contained, among other matters, the deadlines for voting on the Plan and the filing of objections thereto.

12. ***Plan Objections Overruled.*** All objections to the Confirmation of the Plan, including, without limitation, all late filed objections and motions to file out of time objections to the Plan (all of which may herein be called "*Plan Objections*") have either been satisfied by consent, modification and/or amendment to the Plan, or are addressed by these findings of fact and conclusions of law or by prior partial findings and conclusions incorporated into these findings and conclusions, as the case may be. Any objection not so specifically resolved or addressed is OVERRULED.

13. ***Aancor Classes of Claims and Interests.*** The following Aancor Classes of Claims and Interests are treated under the Plan:

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Aancor Class	Description of Class/Interest	Impaired/ Unimpaired
Unclassified	Administrative Claims	Unimpaired
Unclassified	Priority Tax Claims	Unimpaired
1	Other Priority Claims	Unimpaired
2	Secured Claims	Unimpaired
3	General Unsecured Claims	Impaired
4	Aancor Interestholders	Impaired

14. NGC Classes of Claims and Interest. The following Classes of NGC Claims and Interests are treated under the Plan:

NGC Class	Description of Class/Interest	Impaired/ Unimpaired
Unclassified	Administrative Claims	Unimpaired
Unclassified	Priority Tax Claims	Unimpaired
1	Other Priority Claims	Unimpaired
2	Secured Claims	Unimpaired
3	Administrative Convenience Claims	Unimpaired[4]
4A	Senior General Unsecured Claims	Impaired
4B	Other General Unsecured Claims	Impaired

4. Although NGC Class 3 was originally impaired under the Plan, the Technical Modifications have modified the treatment of NGC Class 3, which treatment this Court has heretofore approved.

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5	Priority Senior Subordinated Notes	Impaired
6	Senior Subordinated Debentures	Impaired
7	Subordinated Redeemable Discount Debentures	Impaired
8	Environmental Claims	Impaired
9	Asbestos Disease Claims	Impaired
10	Asbestos Property Damage Claims	Impaired
11	Intercompany Claims	Impaired
12	NGC Interestholders	Impaired

15. ***Technical Modifications.*** Debtors have heretofore filed: *(a)* that certain Motion to Approve Technical Modifications of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. filed on December 4, 1992 (the "*First Modification*"), a copy of which is attached hereto as ***Exhibit A***; *(b)* the Second Motion to Approve Technical Modification of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc., filed on December 15, 1992, which was approved by the Court pursuant to an Order, dated January 15, 1993 (the "*Second Modification*"), a copy of which is attached hereto as ***Exhibit B***; and *(c)* that certain Third Technical Modifications of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc., on March 5, 1993 (the "*Third Modification*"), a copy of which is attached hereto as ***Exhibit C*** (the First Modification, the Second Modification

and the Third Modification being herein collectively called the "*Technical Modifications*"), pursuant to which Debtors have sought to modify the September 4th Plan. The Third Modifications includes provisions to harmonize the Plan with the Bankruptcy Code and this court's jurisdiction. Section 6.5 of the Plan directs that the Confirmation Order contain injunctive provisions. A plan cannot compel a court to enter an injunction beyond its jurisdiction or outside the Code. The Third Modification modified the Plan to accomplish what otherwise would have been ordered by the Court pursuant to its bench ruling of January 29, 1993. The Court hereby finds that the Technical Modifications have not adversely changed the treatment of any Claims or Interests under the September 4th Plan and have been made in compliance with section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019.

16. ***Voting Classes.*** The following voting Classes in the Plan voted to accept the Plan within the meaning of section 1126 of the Bankruptcy Code: Aancor Classes 3 and 4 and NGC Classes 4A, 5, 6, 8, 9 and 10. The following voting Classes in the Plan voted to reject the Plan within the meaning of section 1126 of the Bankruptcy Code: NGC Classes 3, 4B, 7, 11, and 12[5]. By reason of the First Modification, the treatment of the NGC Claims classified in

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5. NGC Classes 1 and 2 and Aancor Classes 1 and 2 did not vote because they were deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. The Plan provides that Claimants in NGC Class 11 and Interestholders in NGC Class 12 will not receive or retain any property under the Plan on account of such Claims or Interests and therefore are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.

NGC Class 3 has been modified, and NGC Class 3 is now deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code.

17. ***Proper Plan Proponents.*** The Debtors are proper proponents of a plan of reorganization pursuant to section 1121(a) of the Bankruptcy Code.

18. ***Compliance with Section 1129(a)(1), Section 1122 and Sections 1123(a)(1)-(7).*** The Plan complies with the applicable provisions of sections 1129(a), 1122 and 1123(a)(1)-(7) of the Bankruptcy Code in that the evidence adduced at the Confirmation Hearing shows that:

(a) The Debtors are corporations organized under the laws of the State of Delaware and are proper debtors under section 109 of the Bankruptcy Code.

(b) The separate classification of certain Claims and Interests in Aancor Classes 2, 3 and 4 and NGC Classes 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, and 12 is appropriate under section 1122(a) of the Bankruptcy Code because the Bankruptcy Code does not require the classification of all substantially similar Claims in the same Class. In addition, the evidence adduced at the Confirmation Hearing shows that separate classification of these Classes is justified because:

(1) Each Claimant holding an Allowed Secured Claim against NGC will retain, unaltered, the Lien that secured such Claim and will have recourse *only* to those assets, rights and properties of NGC's Estate which are the collateral for such Secured Claim.

(2) In the case of NGC Classes 4A, 5 and 6, the holders of Claims in such Classes are entitled to the benefits of contractual subordination provisions of certain Indentures.

(3) The Claimants holding Allowed Unsecured Claims against NGC which are NGC General Unsecured Claims, NGC Debt Securities Claims or NGC Environmental Claims will receive, in satisfaction of such Allowed Claims, their respective Pro Rata Shares of their respective NGC Class Allocations.

(4) The Plan also provides for a limited application and enforcement of the NGC Senior Rights of NGC Classes 4A, 5 and 6 which are created by the Existing NGC Indentures as well as a settlement of the NGC Senior Rights of the Claimants in NGC Classes 4A, 5 and 6; therefore, if the Plan is accepted by NGC Classes 4A, 5 and 6, the Plan provides that the distributions which would otherwise be made to the Claimants holding NGC Debt Securities Claims in NGC Classes 4A and 5 would be reallocated, in part, and such reallocated distributions shared with the Claimants holding NGC Debt Securities Claims arising from the NGC Senior Subordinated Debentures (NGC Class 6) and the NGC Subordinated Redeemable Discount Debentures (NGC Class 7).

(5) Except for the NGC Senior Rights of the NGC Senior Rightholders in NGC Classes 4A, 5 and

6, the Allowed Claims in NGC Classes 4A, 4B, 5, 6, 7, 8, 9, and 10 are all Unsecured Claims, which would otherwise be ranked as to priority on a *pari passu* basis with one another.

(6) The Current Asbestos Disease Claims and the Asbestos Property Damage Claims will be liquidated through the applicable Asbestos Claims Resolution Facility and satisfied from the applicable Asbestos Sharing Allocations of the NGC Asbestos Settlement Fund Assets.

(7) No distributions will be made under the Plan with respect to Intercompany Claims against NGC, if any, and on the Effective Date, all such Intercompany Claims against NGC, if any, will be canceled and extinguished pursuant to the Plan.

(8) The Plan provides for the cancellation of the Existing NGC Common Stock on the Effective Date, and the NGC Interestholders will receive no distributions under the Plan with regard to their Allowed Interests in NGC.

(c) The Plan complies with sections 1123(a)(1)-(7) of the Bankruptcy Code, in that the evidence adduced at the Confirmation Hearing shows the following:

(1) The Plan designates Classes of Claims and Interests, as required by section 1123(a)(1) of the Bankruptcy Code.

(2) The Plan specifies those Classes of Claims and Interests which are impaired and unimpaired as required by sections 1123(a)(2) and 1123(a)(3) of the Bankruptcy Code and contains a specified treatment for each Aancor Class and NGC Class which is impaired.

(3) The Plan provides for the same treatment for each Claim or Interest in a particular Class as required by section 1123(a)(4) of the Bankruptcy Code.

(4) The Plan provides adequate means for its implementation as required by section 1123(a)(5) of the Bankruptcy Code.

(5) The Plan and the New NGC Corporate Documents and NGC Corporate Documents restrict the issuance of non-voting equity securities and provide, as to the several classes of securities possessing voting power, for an appropriate distribution of such power among such classes in accordance with section 1123(a)(6) of the Bankruptcy Code, and the holders of shares of New NGC Common Stock and Reorganized NGC Common Stock will vote on the basis of one vote per share of their respective common stock.

(6) The Plan sets forth the initial officers of New NGC and provides for the selection of the initial New NGC Directors and initial officers and directors of Reorganized NGC; the New NGC

Corporate Documents and the NGC Corporate Documents provide for the selection of successor and additional directors and officers.

(7) No applicable regulatory agency has disapproved any proposed nominee for New NGC Director or proposed nominee for director of Reorganized NGC.

(8) Those provisions of the Plan regarding the selection of officers and directors of New NGC and Reorganized NGC are consistent with the interests of Claimants and Interestholders and with public policy as required by section 1123(a)(7) of the Bankruptcy Code.

19. ***Section 1129(a)(2).*** The Debtors solicited acceptances of the Plan in accordance with the requirements of section 1125(b) of the Bankruptcy Code, Bankruptcy Rule 3017 and the Disclosure Statement Order, and the Debtors, their respective directors, officers, employees, agents, and professionals and the other Persons involved in the negotiation and solicitation of acceptances of the Plan have acted in "*good faith*," within the meaning of section 1125(e) of the Bankruptcy Code.

20. ***Compliance with Section 1129(a)(3).*** The Debtors proposed the Plan in good faith and not by any means forbidden by law. Consistent with the overriding purpose of chapter 11, the Plan is designed to allow the Debtors to reorganize by providing them with the means that will allow them to satisfy their prepetition obligations with sufficient

liquidity and capital resources to conduct their businesses. Moreover, the Plan itself, and the process leading to its formulation, provide independent evidence of the Debtors' good faith.

21. ***Compliance with Section 1129(a)(4).*** All payments made, or to be made, by the Debtors or by a Person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the Reorganization Cases, or in connection with the Plan and incident to the Reorganization Cases, have been approved by, or are subject to the approval of, the Court as reasonable.

22. ***Compliance with Section 1129(a)(5).*** The Debtors have disclosed, in the Disclosure Statement and at the hearing on Confirmation of the Plan, the identity of each insider who is proposed to be retained by New NGC and Reorganized NGC and the nature of the compensation for such insider, if any. Each director of NGC has agreed to resign as of the Effective Date and will be replaced by the New NGC Directors pursuant to the Plan. The Plan contemplates that the New NGC Directors and their successors will select, or delegate the selection of, the officers of New NGC. Reorganized NGC will have a three (3) to nine (9) member board of directors. The Persons who will initially serve, after the Effective Date, as the directors of Reorganized NGC shall be the same Persons who are approved by the Court as Fund Administrators of the NGC Asbestos Settlement Fund.

23. ***Compliance with Section 1129(a)(6).*** The Debtors' businesses do not involve the establishment of rates over which any regulatory commission has or will have jurisdiction after Confirmation.

24. ***Compliance with Section 1129(a)(7).*** NGC has a liquidation value of $203.94 million. Based on the findings made below regarding the enterprise values of New NGC and Austin, the Court finds with respect to each impaired Class of Claims or Interests, each holder of an impaired Claim or Interest of such Class has either accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that *is not less than* the amount such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date. Section 1111(b)(2) of the Bankruptcy Code does not apply to the Claims of any Class, and no election pursuant to such section has been made in these Reorganization Cases.

25. ***Compliance with Section 1129(a)(8).*** Each NGC Class that is impaired under the Plan has accepted the Plan, except for NGC Classes 4B, 7, 11 and 12, which either voted in number and/or in amount to reject, or which, pursuant to section 1126(g) of the Bankruptcy Code, are deemed to have rejected, the Plan.

26. ***Compliance with Section 1129(a)(9).*** The Plan provides for the treatment of Administrative Claims, Priority Tax Claims and Other Priority Claims entitled to priority pursuant to sections 507(a)(3)-(6) of the Bankruptcy Code in the manner required by section 1129(a)(9) of the Bankruptcy Code.

27. ***Compliance with Section 1129(a)(10).*** At least one Class of Claims that is impaired under the Plan has accepted the Plan, determined without including any acceptance of the Plan by any insider of NGC or Aancor.

28. ***Compliance with Section 1129(a)(11).*** After Confirmation, the Debtors will be able to satisfy their obligations under the Plan. The Plan is feasible, and the Confirmation of the Plan is not likely to be followed by the liquidation (except as provided for Aancor in the Plan) or the need for further financial reorganization of either of the Debtors. This finding is supported by the projections of operations for the Debtors contained in the Disclosure Statement and the testimony in regard thereto presented at the Confirmation Hearing. These projections indicate that, based upon New NGC's operating performance going forward and the capital structure contemplated by the Plan, the Debtors will be able to meet the requirements under the Plan, pay their debts, and build sufficient cash balances.

29. ***Compliance with Section 1129(a)(12).*** The Debtors have paid all fees required pursuant to 28 U.S.C. § 1930 and all charges imposed by the United States Trustee ("*UST*") to date and will continue to pay any future UST charges.

30. ***Compliance with Section 1129(a)(13).*** The Plan contains provisions regarding certain retiree benefits as defined by section 1114(a) of the Bankruptcy Code that would require continuance under the Bankruptcy Code. As part of the Plan, the Debtors shall assume and continue all pension, retirement, savings, health care, dental care, life, disability, accidental death and dismemberment, bonus, incentive compensation, and other benefit plans or arrangements for directors, officers and employees (both active and former) of NGC, except as specifically stated therein. Specifically, New NGC will not assume or be

obligated for payments under any executive deferred compensation plan or arrangement which was in effect on, or pursuant to which payments were made by NGC as of, the Petition Date.

31. ***Ability to Effectuate Plan.*** Pursuant to the Plan, the Debtors will provide all Cash necessary to pay to Claimants holding Administrative Expense Claims, Priority Tax Claims and Other Priority Claims thereunder in an effort to effectuate the Plan.

32. ***Assumption/Rejection of Executory Contracts and Unexpired Leases.*** The Plan provides that it constitutes a motion by the Debtors pursuant to section 365 of the Bankruptcy Code, to reject any and all executory contracts and unexpired leases of the Debtors *except*:

> *(1)* those which shall, before the Confirmation Date, have been rejected or assumed pursuant to an Order of the Bankruptcy Court or be the subject of pending motions by any of the Debtors to reject or assume pursuant to section 365 of the Bankruptcy Code; *(2)* those executory contracts and unexpired leases set forth in ***Section 7.2*** [of the Plan]; *(3)* those specifically designated on the schedule attached as ***Exhibit F*** to the Plan which are to be assumed, or assumed and assigned where applicable, by the respective Debtor (which list may be further amended or supplemented prior to the Confirmation of the Plan); and *(4)* those which are specifically treated otherwise in the Plan.

As to those executory contracts or unexpired leases assumed or assumed and assigned by the Debtors, the Debtors will

pay the cure amounts identified in ***Exhibit F*** to the Plan and/or orders heretofore entered by the Court in full and in Cash on the Effective Date of the Plan. The evidence adduced at the Confirmation Hearing shows that the assumption or assumption and assignment, as the case may be, of the executory contracts and unexpired leases listed on ***Exhibit F*** to the Plan is in the best interests of the Debtors.

33. ***Valuation of New NGC and Austin.*** For purposes of the Confirmation of the Plan, pursuant to section 1129(b) of the Bankruptcy Code, the Court finds that the enterprise value of New NGC will be $350 million on the effective date, with the asbestos-related litigation protection provided by the Plan and the Confirmation Order, and that the enterprise value of Austin will be $125 million.

34. ***Compliance with Section 1129(b).*** The Plan does not discriminate unfairly against, and is fair and equitable with respect to, NGC Classes 4B, 7, 11, and 12 and meets all of the requirements of section 1129(b) of the Bankruptcy Code with respect to such Classes, because:

(a) While NGC Class 4B will only receive distributions estimated at 32.1%, NGC Class 7 will receive only 2,184,495 of New NGC Warrants[6], and NGC Class 11 will receive no distributions under the Plan; therefore, no Claims or Interests which are junior to the Claims classified in NGC Classes 4B, 7 and 11

6. As described in ***Section 1.123*** of the Plan, the New NGC Warrants entitle the holders thereof to purchase one share of New NGC Common Stock for each warrant held at an exercise price of $14.50.

(which NGC Classes are of equal priority with each other) will receive or retain any property under the Plan. Likewise, while NGC Class 12 will receive no distributions under the Plan, no Interests which are junior to the Interests classified in NGC Class 12 will receive or retain any property under the Plan.

(b) Under the Plan, no Class of Claimants or Interestholders will receive more than 100% of its Claims or Interests. The value of the Debtors' assets to be distributed, as of the Effective Date, to each Class of Claimants is *equal to and not more than* that mandated under the Plan.

(c) In conjunction with the allocation of the New NGC Securities pursuant to the Plan, NGC requested Donaldson, Lufkin & Jenrette ("*DLJ*") to prepare a valuation analysis in order to allow NGC to estimate post-Confirmation values of such Securities. In valuating New NGC, DLJ reviewed financial projections and arrived at an estimated reorganization value for New NGC of between $300 million and $375 million, with a mid-point value of $350 million. The enterprise value estimated by DLJ is based on economic market, financial, and other conditions. Specifically, DLJ: *(1)* reviewed certain publicly available financial statements of NGC for recent years and interim periods; *(2)* considered the value of NGC's assets, including plants, quarries and mines, as estimated by NGC and its outside consultants; *(3)* reviewed certain financial projections prepared by senior management of NGC for the operations of New NGC through 1997; *(4)* reviewed

the assumptions underlying New NGC's projections which were prepared by senior management of the Debtors; *(5)* prepared discounted cash flow analyses for the operating business of New NGC on a going concern basis, based on the cash flow projected to be available to New NGC, utilizing various discount rates and the financial projections referred to above; *(6)* considered the market values of publicly traded companies that are in businesses reasonably comparable to the operating business of New NGC; *(7)* considered the financial terms, to the extent publicly available, of certain historical acquisitions of companies whose operating businesses are believed to be reasonably comparable to that of New NGC; *(8)* considered certain economic and industry information relevant to the operating business of NGC; *(9)* discussed the current operations and prospects of the operating business with the senior management of NGC; *(10)* visited several plants; and *(11)* made such other analyses and examinations as necessary or appropriate.

(d) As further evidence that the enterprise value of New NGC is approximately $350 million, a group of holders of NGC Priority Senior Subordinated Notes (the "*Senior Bondholder Group*") presented the testimony of Donald Smith of Houlihan, Lokey, Howard and Zukin ("*HLHZ*"). At the request of the Senior Bondholder Group, HLHZ had prepared a valuation analysis of New NGC and the securities to be issued under the Plan. HLHZ's expert opinion was that the enterprise value of New NGC was between $300 million and $350 million. HLHZ employed the following four valuation

methodologies to arrive at its enterprise valuation for New NGC: *(1)* market capitalization method; *(2)* capitalization of earnings method; *(3)* comparison of NGC to United States Gypsum; and *(4)* discounted cash flow analysis.

(e) The capital structure set forth in the Plan is based on an enterprise value of $350 million, which enterprise value is dependent upon the asbestos-related litigation protection provided to New NGC by the Plan and the Confirmation Order. The New NGC Senior Notes will have a value of $100 million and the New NGC Common Stock will have a value of $250 million.

35. ***LBO Settlement.***

(a) The Plan provides for the comprehensive settlement (herein called the "*LBO Settlement*") of certain LBO Actions relating to the LBO. With the advice of its counsel and its financial advisors, the Debtors have evaluated the LBO Settlement. In addition, the BT Committee, the Asbestos Committee and the Legal Representative, as well as their respective legal counsel, financial advisors and accountants have evaluated the LBO Settlement. The Debtors have concluded that the consummation of the transactions contemplated by the LBO Settlement is in the best interests of the holders of Claims against and Interests in the Debtors.

(b) The Court is required to make an independent determination of the fairness to the Debtors of the LBO

Settlement. With the amendments to ***Section 6.8*** of the Plan contained in the Third Modification, the Court determines that the LBO Settlement is fair and reasonable to the Debtors and their respective Claimants and Interestholders. In approving the LBO Settlement, the Court has considered:

(1) the balance of the likelihood of success of the LBO Actions asserted by the Debtors against the likelihood of the success of defenses or counterclaims possessed by the Released Parties;

(2) the prospect of complex, costly and protracted litigation that would result from the requirement for a judicial resolution of the LBO Action among the parties;

(3) the fact that the Released Parties may have filed large Claims against the Debtors, jointly and/or severally, in the Reorganization Cases, and, as a result, the likelihood of substantial delay in any distribution to the holders of Claims and Interests of any dividend from the Estates if the LBO Settlement is not consummated;

(4) the objections to the LBO Settlement by any party-in-interest, which the Court has overruled except to the extent reflected in the Third Modification, and the acceptance of the Plan by a majority of the parties-in-interest; and

(5) the fact that the Plan, which gives effect to the LBO Settlement, is the product of arm's length negotiations among various parties-in-interest.

(c) In return for the releases contained in the settlement, the Released Parties waive their claims for interest and agree to a distribution of assets to holders of junior claims not otherwise available to them under § 1129(b) of the Code. The release by the Debtors of the LBO Actions set forth in the Third Modification of the Plan constitutes a good faith compromise and settlement of the LBO Actions that could be brought (or could have been brought) by the Debtors (whether directly or on behalf of Claimants or Interestholders) against the Released Parties. The settlement facilitates reorganization by protecting, in part, the economic distributions of the Plan. The settlement with the Released Parties is in the best interests of the estate and within a range of reasonableness considering the costs and complexity of the litigation.

(d) The settlement is fair and equitable under § 1129(b) of the Code as to NGC Classes 4B and 7. As a result of the settlement, Classes 4B and 7 receive more than they would otherwise receive under § 1129, assuming enforcement of senior contractual rights.

(e) The release by Persons of the Released Parties and the other non-debtor parties ("*Other Released Parties*") contemplated under ***Section 6.8(c)*** of the September 4th Plan is accomplished only on a contractual basis. Those Persons who consented to such

release by affirmatively checking the "*I Consent To Release*" box on the ballots provided to them to accept or reject the Plan contractually released such Released Parties and the Other Released Parties from the LBO Actions which such Persons have asserted, or may assert, against the Released Parties and the Other Released Parties.

36. ***No Intent to Avoid Taxes/Securities Laws.*** The primary purpose of the Plan is not avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933, as amended (the "*Securities Act*"). There has been no request by any Governmental Unit to make a finding that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of the securities laws in contravention of section 1129(d) of the Bankruptcy Code.

37. ***No Denial of Discharge.*** The Debtors would not be denied a discharge under Section 727(a) of the Bankruptcy Code if the Reorganization Cases were cases under chapter 7 of the Bankruptcy Code.

38. ***Continuation with the Plan Pending Appeal/Stay.*** The Debtors intend to consummate the Plan if a Confirmation Order is appealed but no stays pending appeal are obtained.

39. ***Injunction and Channelling Orders Regarding Asbestos Claims.***

(a) The Plan and the Confirmation Order provide a single, economical procedure for encouraging and

obtaining the prompt, efficient and equitable resolution of Asbestos Claims against the Debtors and to provide for the efficient delivery of equitable compensation to Asbestos Claimants.

(b) The injunctions and channelling order provided in ***Sections 6.5(a)*** and ***(b)*** of the Plan (herein respectively called the "*Injunction*" and "*Channelling Order*"), are essential to the viability of the business operations of New NGC and to the successful implementation of the Plan, including assuring asbestos-related litigation protection to New NGC to provide it with an enterprise value of $350 million on the effective date.

(c) Notice of the Injunction and the Channelling Orders and other relief related to Confirmation has been provided by means reasonably calculated to inform all those affected by the Confirmation Order and the opportunity to object to the relief was afforded to all interested parties. The Legal Representative filed a timely objection to a permanent injunction against Unknown Asbestos Disease Claimants. The court sustained the objection. Following the court's ruling, the Debtors modified the Plan to delete the provision for a permanent injunction against Unknown Asbestos Disease Claimants. Neither the Debtors nor the Asbestos Committee know the identities of all the holders of Current Asbestos Disease Claims. The Legal Representative represents persons exposed to NGC asbestos or asbestos containing products not known to the Debtors or the Asbestos Committee. The Legal Representative received notice of the injunction against

Current Asbestos Disease Claimants. Current Asbestos Disease Claimants hold claims under the Bankruptcy Code. The court has not and will not impose a proof of claim bar date on them. Their claims will be paid by the NGC Asbestos Settlement Fund.

(d) If the Injunction and the Channelling Orders are not issued to protect New NGC from the assertion of Asbestos Claims and other related liabilities, the Debtors would be unable to consummate the Plan.

*40. **Securities Findings.***

(a) Each of New NGC and Reorganized NGC constitutes or will constitute a "*successor*" and a "*newly organized successor*" to NGC for purposes of sections 1145 and 1125(e) of the Bankruptcy Code and each of NGC and New NGC has participated or will participate in good faith and in compliance with the applicable provisions of the Bankruptcy Code in the offer, sale, issuance and distribution of the Plan Securities, and any other securities that may be deemed to be offered, sold, issued or distributed pursuant to the Plan and the transactions contemplated thereunder, including, without limitation, any interests in the NGC Asbestos Settlement Fund, to the extent such interests constitute a security under the Securities Act (such securities being herein collectively called the "*Other Securities*"), pursuant to the Plan. In addition, to the extent interests in the NGC Asbestos Settlement Fund constitute a security under the Securities Act, the NGC Asbestos Settlement Fund constitutes a "*successor*" and a "*newly organized*

successor" to NGC for purposes of sections 1145 and 1125(e) of the Bankruptcy Code, respectively.

(b) The Debtors have solicited the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code.

(c) With respect to the offer, sale, issuance and distribution of the Debtors' Plan Securities, and the Other Securities, if any, *(1)* New NGC, NGC, Reorganized NGC and the NGC Asbestos Settlement Fund are not underwriters within the meaning of section 1145(b) of the Bankruptcy Code, *(2)* the offer, sale and issuance of the Plan Securities, and the Other Securities, if any, are, and shall be, pursuant to a plan of reorganization, such as the Plan, *(3)* the Plan Securities, and the Other Securities, if any, are to be distributed in exchange for Claims against NGC, *(4)* the New NGC Securities and the New NGC Warrant Shares, as securities of New NGC, constitute securities of a successor to NGC under a plan of reorganization, such as the Plan, *(5)* the Reorganized NGC Common Stock, as securities of Reorganized NGC, constitutes securities of a successor to NGC under a plan of reorganization, such as the Plan, and (6) the Other Securities, if any, constitute securities of a successor to NGC under a plan of reorganization, such as the Plan.

(d) The disclosure to New NGC by the depositories, transfer agents, street name holders, and all other banks, brokers, or agent nominee record holders of Existing NGC Debt Securities (collectively "*Record Holders*")

of: *(1)* the identity of the beneficial owners of Existing NGC Debt Securities held of record by the Record Holders for the benefit of third party beneficial owners and *(2)* the amount and type of Existing NGC Debt Securities attributable to such third party beneficial owners is essential to the completion, implementation, and operation of the New NGC Registration Rights Agreement.

*41. **Asbestos Claims Findings.***

(a) The Court finds that, as of January 15, 1993, there were approximately 62,000 Current Asbestos Disease Claims against NGC that had not been resolved, all of which constitute "*Claims*" within the meaning of section 101(5) of the Bankruptcy Code. The Court also finds that the Center for Claims Resolution will, in all likelihood, resolve and settle these 62,000 Current Asbestos Disease Claims for approximately $127 million in indemnity payments plus administrative costs. The Claims pending on January 15, 1993, constitutes a fair approximation of the total Current Asbestos Disease Claims for the court to find that those Claims will be resolved and settled by the NGC Asbestos Settlement Fund.

(b) The Court finds that the Unknown Asbestos Disease Claims that may be asserted against NGC in the future will range from 150,000 to 165,000 Claims. The Court also finds that these Unknown Asbestos Disease Claims have an indemnity value of between $695 million and $765 million.

(c) The Court finds that Insurance Coverage available for the valuation of Asbestos Claims ranges from $300 million to $600 million. Of such Insurance Coverage, only $300 million is not currently being disputed in various court proceedings. If all of the litigation regarding Insurance Coverage is concluded in favor of NGC, there will be between $585 million and $600 million in Insurance Coverage for the resolution of Asbestos Claims. If the disputes regarding the Insurance Coverage result in at least $585 million in Insurance Coverage for Asbestos Claims, the NGC Asbestos Settlement Fund, using the CCR to resolve Asbestos Claims, should be able to pay Asbestos Claims, including Unknown Asbestos Disease Claims, and fulfill its purpose and obligations under the Plan. In such event, asbestos-related litigation against other Persons, including New NGC, to the extent permitted under applicable non-bankruptcy laws, should be both remote and negligible. If, however, the Insurance Coverage for Asbestos Claims, including Unknown Asbestos Disease Claims, is only $300 million, the NGC Asbestos Settlement Fund, with the implementing orders entered by the Court pursuant to ***Section 5.1(m)(1)*** of the Plan, which implementing orders are contained in ***Section 9*** of the Confirmation Order (the "*Asbestos Implementing Orders*"), should still fulfill its purposes and obligations under the Plan, and asbestos-related litigation, if any, against other Persons, including New NGC, to the extent permitted under applicable non-bankruptcy laws, should be both remote and negligible.

(d) The Court finds that the Asbestos Implementing Orders preserve the Fund Administrators' flexibility and discretion, preserve the Fund Advisory Committees, protect the performance of the Fund Administrators' fiduciary obligations, provide ultimate judicial supervision of the NGC Asbestos Settlement Fund, and provide, to the extent foreseeable and predictable, assurances that the NGC Asbestos Settlement Fund will fulfill its mandate, even if the NGC Asbestos Settlement Fund must adjust to changing circumstances or unavailable insurance or other potential factors. Moreover, with the Asbestos Implementing Orders, the Court finds that New NGC will have sufficient protection from asbestos-related litigation for New NGC to have an enterprise value of $350 million on the effective date.

(e) The treatment of Asbestos Property Damage Claims, which may total $700 million according to confirmation hearing evidence, provided in the Plan, including, without limitation, the aggregate value of the consideration dedicated to Asbestos Property Damage Claims therein and the procedure for resolving such Asbestos Property Damage Claims, is fair and reasonable.

(f) The Asbestos Sharing Allocations established in the Plan for the purpose of allocating the NGC Asbestos Settlement Fund Assets between Asbestos Disease Claimants and Asbestos Property Damage Claimants are fair and reasonable.

(g) The Fund Advisory Committee functions will be to provide advice to the Fund Administrators on the

tort system and to assist in preserving the economic settlement contained in the Plan. The Fund Advisory Committees are not fiduciaries under the Plan and the NGC Asbestos Settlement Fund Documents. The members of the respective Fund Advisory Committees either currently represent, or may in the future represent, beneficiaries of the NGC Asbestos Settlement Fund. Consequently, in exercising their respective advisory duties, the Fund Advisory Committees cannot frustrate or impede the Fund Administrators in the performance of their respective fiduciary duties and obligations under the Plan and the NGC Asbestos Settlement Fund Documents. Therefore, the NGC Asbestos Settlement Fund Documents must provide that any disagreement, dispute or question that arises between the Fund Advisory Committees (or either of them) and the Fund Administrators, which cannot be resolved by an agreement of all such parties, shall be submitted to the Court for final resolution. If a Fund Advisory Committee withholds consent when requested by the Fund Administrators, the Fund Administrators may apply to the court for authorization to act.

(h) Subject to the Asbestos Implementing Orders, persons holding Asbestos Claims (including those Persons who may now, or in the future, hold Unknown Asbestos Disease Claims) should be fairly and similarly treated under the Plan, and the NGC Asbestos Settlement Fund Assets should be sufficient to resolve Asbestos Claims pursuant to the terms of the Plan.

Appendix D

42. ***Plan Documents.***

(a) The Debtors have disclosed all material facts relating to the various Plan Documents to be entered into, executed and delivered, adopted or amended by them in connection with the Plan, including the following agreements and documents, forms of which are attached as exhibits hereto:

Title of Document	**Exhibit Designation**
NGC Asbestos Settlement Fund Documents	D
Assets Purchase Agreement	E
Pre-Closing Agreement (Intentionally Omitted)	F
Transfer of Pension Plan Assets and Assumption of Pension Plan Liabilities Agreement	G
Austin Corporate Documents	H
New NGC Corporate Documents	I
New NGC Registration Rights Agreement	J
New NGC Senior Note Indenture	K
New NGC Warrant Agreement	L
NGC Corporate Documents	M
Merger Agreement for Aancor	N
Tax Allocation Agreement	O
Representation Agreement (Intentionally Omitted)	P

(b) Notwithstanding any contrary provisions of the business corporation or trust laws of any applicable Governmental Unit, no action of the respective directors or shareholders of the Debtors, Reorganized NGC, New NGC or Austin or the Fund Administrators will be required to authorize any such entity to enter into, execute and deliver, or adopt or amend, as the case may be, the Plan Documents, and following the Effective Date, each Plan Document will be a legal, valid and binding obligation of each such entity in accordance with the respective terms thereof (subject only to bankruptcy, insolvency and other similar laws affecting creditors rights generally, and subject also to general equitable principles).

43. ***Satisfaction of Conditions to Confirmation.*** Each of the conditions precedent to the entry of this Confirmation Order, as set forth in ***Article II*** of the Plan, has been satisfied.

44. ***Mixed Findings of Fact/Conclusions of Law.*** Any finding of fact herein which constitutes a conclusion of law shall be deemed a conclusion of law.

B. CONCLUSIONS OF LAW

1. ***Jurisdiction and Venue.*** The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b) and 1334(a), 11 U.S.C. § 101, *et seq.*, and the General Order of Reference No. 8 of the United States District Court for the Northern District of Texas, entered August 3, 1984. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409(a).

2. ***Core Proceeding.*** This matter is a "*core*" proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L).

3. ***Debtors Burden of Proof Satisfied.*** The Debtors have satisfied their burden of producing evidence to the Court that the Plan complies with sections 1129(a) and 1129(b) of the Bankruptcy Code.

4. ***Technical Modifications.*** The notice provided by the Debtors of the Technical Modifications was adequate and appropriate under the circumstances and, accordingly, shall be, and hereby is, approved. The Technical Modifications: *(a)* comply with section 1127 of the Bankruptcy Code, Bankruptcy Rule 3019, and all other provisions of the Bankruptcy Code, including, without limitation, sections 1122 and 1123; and *(b)* do not adversely change the treatment under the Plan of any Claims or Interests. In light of the technical nature of the Technical Modifications, no additional disclosure under section 1125(b) of the Bankruptcy Code is required with respect to the Technical Modifications. Accordingly, pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Claimants holding Claims and Interestholders holding Interests that have accepted or are deemed to have accepted the September 4th Plan are presumed to have accepted the Technical Modifications and the September 4th Plan.

5. ***Compliance with Sections 1122, 1123 and 1129.*** As set forth in ***Section A*** of these Findings & Conclusions, the Plan complies with the applicable requirements of sections 1122, 1123 and 1129 of the Bankruptcy Code, with the exception of section 1129(a)(8), which non-compliance

has been resolved by the Confirmation of the Plan pursuant to section 1129(b) of the Bankruptcy Code.

6. ***Approval of LBO Settlement.***

(a) The Court has jurisdiction to approve the proposed settlement of the LBO Actions pursuant to 28 U.S.C. § 1334(a), section 502 of the Bankruptcy Code, and Bankruptcy Rules 9019 and 2002(a).

(b) The settlement of the LBO Action with the release in the Third Modification of the Plan is in the best interests of the estate and within a range of reasonableness for resolving costly, complex and uncertain litigation. The settlement is fair and equitable under § 1129(b) of the Code as to NGC Classes 4B and 7.

7. ***Assumption of Executory Contracts and Unexpired Leases.*** The assumption and assumption and assignment of certain unexpired leases and executory contracts provided for in ***Exhibit F*** to the Plan is in the best interest of the Debtors and the Debtors will promptly cure defaults and/or provide adequate assurance of future performance. Therefore, section 365 of the Bankruptcy Code is satisfied.

8. ***Injunction and Channelling Orders Regarding Asbestos Claims.***

(a) ***Injunction Order.*** Current Asbestos Disease Claims and Asbestos Property Damage Claims constitute claims under § 101(5) of the Code. The Plan provides

for the channelling of these Claims to the NGC Asbestos Settlement Fund for resolution. NGC Classes 9 and 10 have accepted the Plan. Except as provided in the Plan or the Confirmation Order, confirmation discharges NGC from these claims and the property of the estate dealt with by the Plan is free and clear of these claims. 11 U.S.C. § 1141. The permanent injunction of § 6.5 of the Plan as set forth in the Third Modification implements the provisions of the Code. 11 U.S.C. §§ 524 and 1141.

(b) ***Channelling Order.*** Unknown Asbestos Disease Claims do not constitute Claims under § 101(5) of the Code. The Code's discharge and injunction provisions do not apply to Unknown Asbestos Disease Claims and Claimants. The Plan and the Confirmation Order cannot impose a permanent injunction on the Unknown Asbestos Disease Claimants. The Third Modification of the Plan deletes any provision for a permanent injunction.

Unknown Asbestos Disease Claimants do constitute parties in interest represented by the Legal Representative. The Plan provides that Reorganized NGC retain property to fund the NGC Asbestos Settlement Fund to resolve Unknown Asbestos Disease Claims fairly and similarly to Current Asbestos Disease Claims. The NGC Asbestos Settlement Fund constitutes a trust. By the Plan and Confirmation Order, the Unknown Asbestos Disease Claimants become beneficiaries of that trust. The Bankruptcy Code authorizes the court to issue a Confirmation Order

necessary to implement the Plan. New NGC cannot operate as a going concern with an enterprise value of $350 million on the effective date without protection from asbestos litigation. Without protection from asbestos litigation, the Plan cannot be implemented. To resolve Unknown Asbestos Disease Claims from the property by NGC for the trust and to implement the Plan, Unknown Asbestos Disease Claims may be channelled to the NGC Asbestos Settlement Fund. Necessarily, with the channelling order, Unknown Asbestos Disease Claims may be enjoined from commencing litigation against New NGC pending exhaustion of the trust remedy.

(c) ***Recovery.*** The Bankruptcy Code authorizes the disallowance of claims for punitive damages. The NGC Asbestos Settlement Fund as constituted by the Plan and Confirmation Order cannot compensate Asbestos Claimants including Unknown Asbestos Disease Claimants for punitive damages. Payment of punitive damages would prevent the fair and similar treatment of the Fund beneficiaries.

9. ***Binding Effect of the Plan and the Confirmation Order.*** The provisions of the Plan and the Confirmation Order will be binding on the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, all Claimants and Interestholders (whether or not impaired under the Plan and whether or not, if impaired, they accepted the Plan), any other Person making an appearance in the Reorganization Cases, and any other Person or entity affected thereby, as well as their respective heirs, successors, assigns,

trustees, subsidiaries, affiliates, officers, directors, agents, employees, representatives, attorneys, beneficiaries, guardians, and similar officers or any Person claiming through or in the right of any such Person.

10. ***Retention of Jurisdiction Proper.*** The Court may retain jurisdiction over the matters set forth in ***Article VIII*** of the Plan and ***Section 29*** of the Confirmation Order.

11. ***Continuation of the Debtors.*** The Plan and the transactions contemplated by it do not provide for, and, when consummated, will not constitute, the liquidation of all or substantially all of the property of the Estate of NGC within the meaning of section 1141(d)(3) of the Bankruptcy Code.

12. ***Incorporation of Bench Rulings and Partial Findings of Fact and Conclusions of Law.*** As additional findings of fact and conclusions of law, the Court hereby incorporates all other bench rulings and partial findings of fact and conclusions of law heretofore made by the Court in connection with the Confirmation of the Plan, including, without limitation, the partial findings of fact and conclusions of law made by the Court on January 29, 1993, February 8, 1993, March 1, 1993, and March 3, 1993, pursuant to Bankruptcy Rule 7052 (the "*Partial Findings*"). To the extent the Partial Findings conflict with these Findings and Conclusions, these Findings and Conclusions shall control.

13. ***Mixed Conclusions of Law/Findings of Fact.*** Any conclusion of law which constitutes a finding of fact shall be deemed a finding of fact.

Appendix D

C. CONCLUSION

These Findings and Conclusions shall serve to support the entry of the Confirmation Order confirming the Plan.

DATED: March 9, 1993.

s/ Steven A. Felsenthal
STEVEN A. FELSENTHAL
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION CONFIRMING THE FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION OF NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC. DATED MARCH 9, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

CASE NO. 390-37213-SAF-11

NATIONAL GYPSUM COMPANY,
a Delaware corporation,

CASE NO. 390-37214-SAF-11

AANCOR HOLDINGS, INC.,
a Delaware corporation,

DEBTORS.

ORDER CONFIRMING THE FIRST AMENDED AND RESTATED JOINT PLAN OF REORGANIZATION OF NATIONAL GYPSUM COMPANY AND AANCOR HOLDINGS, INC.

National Gypsum Company ("*NGC*") and Aancor Holdings, Inc. ("*Aancor*"), debtors and debtors-in-possession (herein collectively called the "*Debtors*") in the above-

captioned chapter 11 cases (the "*Reorganization Cases*"), filed their respective petitions for reorganization relief under chapter 11, title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "*Bankruptcy Code*"), on October 28, 1990 (the "*Petition Date*"), and filed Debtors' First Amended and Restated Joint Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for National Gypsum Company and Aancor Holdings, Inc., dated as of September 4, 1992 (the "*September 4th Plan*"). The September 4th Plan, as modified by the Technical Modifications (as hereinafter defined), is herein called the "*Plan*"[1].

All findings of fact and conclusions of law, together with all other bench rulings entered by the Court in connection with the Confirmation of the Plan, are hereby adopted and incorporated herein, and for all of the reasons set forth therein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. ***Confirmation.*** The September 4th Plan, as modified by this Order and the modification set forth in: *(a)* the Technical Modifications of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and

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1. Capitalized terms used in this Order shall have the meanings ascribed to them in the Plan, unless otherwise defined herein. In addition, in accordance with ***Article I*** of the Plan, any term used in the Plan or this Order that is not defined in the Plan or this Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning ascribed to such term in the Bankruptcy Code or the Bankruptcy Rules.

Aancor Holdings, Inc., dated December 4, 1992 (the "*First Modification*"), *(b)* the Second Motion to Approve Technical Modification of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc., filed on December 15, 1992 (the "*Second Modification*"), which Second Modification was approved by an Order entered by the Court on January 15, 1993, and (c) the Third Technical Modification of First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. dated March 5, 1993 (the "*Third Modification*"), and each of the provisions of the September 4th Plan, as so modified, shall be, and hereby are, CONFIRMED (the First Modification, the Second Modification and the Third Modification are herein collectively called the "*Technical Modifications*"). If there is any conflict between the terms of the Plan and the terms of this Order, the terms of this Order shall control.

2. ***Technical Modifications.*** To the extent not previously approved by the Court, the Technical Modifications are approved. Acceptances and rejections previously cast for or against the September 4th Plan are deemed to constitute acceptance or rejections of the September 4th Plan as modified by the Technical Modifications and this Order.

3. ***Motions to Challenge, Designate or Disqualify Votes and Plan Objections.***

(a) ***Motions to Challenge, Designate or Disqualify Votes on the Plan.*** All motions to challenge, designate or in any way disqualify any votes cast to accept or reject the Plan, including, without limitation, all motions brought by

the Trade and Bond Committee pursuant to section 1126(e) of the Bankruptcy Code, are hereby denied.

(b) ***Plan Objections.*** All objections (and all reservations of rights included therein) to the Confirmation of the Plan and responses to, and statements and comments regarding, such objections (all of which are herein collectively called "*Plan Objections*"), other than those withdrawn in writing prior to, or on the record at, the Confirmation Hearing or otherwise resolved by the Technical Modifications or this Order or by prior court rulings including the bench rulings of January 29, 1993, and March 3, 1993, and rulings contained in the partial findings of fact and conclusions of law, dated February 8, 1993, and March 1, 1993, which are incorporated into this Order, including any late filed Plan Objections or motions for leave to file Plan Objections out of time, are overruled or denied, as the case may be.

4. ***Approval of Plan Documents.***

(a) ***Approval of Plan Documents by this Order.*** Consistent with the Plan, and in particular ***Article V*** thereof, entitled "*Means for Execution of Plan*", the following listed agreements and documents (forms of which are attached as ***Exhibits D*** through ***O*** to the [Proposed] Findings of Fact and Conclusions of Law on Confirmation of the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. (the "*Findings & Conclusions*"], and all amendments, modifications and restatements thereof (which agreements and documents shall be substantially in the respective forms thereof as are attached as exhibits to the Findings &

Conclusions), including, without limitation, all annexes, exhibits and schedules thereto, and all terms and conditions thereof, are hereby approved[2]:

(1) The NGC Asbestos Settlement Fund Documents;

(2) The Assets Purchase Agreement;

(3) The Transfer of Pension Plan Assets and Assumption of Pension Plan Liabilities Agreement;

(4) The Austin Corporate Documents;

(5) The New NGC Corporate Documents;

(6) The New NGC Registration Rights Agreement;

(7) The New NGC Senior Note Indenture;

(8) The New NGC Warrant Agreement;

(9) The NGC Corporate Documents;

(10) The Merger Agreement for Aancor; and

(11) The Tax Allocation Agreement.

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2. All of the listed agreements and documents and all other agreements, documents and instruments which are or may be necessary or appropriate to implement the Plan, together with all amendments and modifications thereto and restatements thereof, are herein collective called "Plan Documents".

(b) ***Approval of Plan Documents by Separate Order.*** Any Plan Document required to implement the Plan which is not approved by the Court pursuant to this Order shall be approved by separate Order of the Court after due notice and hearing.

(c) ***Changes in Plan Documents.*** The Plan Documents may embody such further changes and modifications thereto as may be approved by the Fund Administrators or the officers of the Debtors, New NGC, Reorganized NGC, or Austin, as the case may be, executing the same; *provided, however*, that any such change or modification that would have a material adverse effect on the parties receiving consideration or rights under any of the Plan Documents as amended or modified will not be effective unless approved by the Court after due notice and hearing.

(d) ***Execution, Delivery and Performance of Plan Documents.*** The Debtors, Reorganized NGC, New NGC, and the NGC Asbestos Settlement Fund, and their respective officers, directors and representatives (including, where applicable, the Fund Administrators), are hereby authorized, empowered and ordered to enter into, execute and deliver, or adopt or amend, as the case may be, the Plan Documents and to perform their respective obligations thereunder and to take such other actions in connection therewith as they may deem to be necessary or appropriate to complete the transactions and accomplish the purposes of the Plan and the Plan Documents.

5. ***Merger.*** The Merger of Aancor with and into NGC on the Effective Date, as contemplated by ***Section 5.2*** of the

Plan, is approved and authorized, and the Debtors are authorized, empowered and ordered to take such actions as they deem to be necessary or appropriate to effectuate the Merger, including, without limitation, the execution and delivery of the Merger Agreement and all other appropriate agreements, documents and instruments related thereto, and the making of such filings in connection therewith as may be required under the laws of any applicable Governmental Unit.

*6. **Assets Sale.***

*(a) **Transfer of NGC Sale Assets.*** Pursuant to sections 105(a) and 1123(a)(5)(D) of the Bankruptcy Code, the Assets Purchase Agreement and the Assets Sale contemplated thereunder are approved and authorized, and NGC is authorized, empowered and ordered to sell and assign all of its rights, titles and interests in and to the NGC Sale Assets and to transfer and convey good title to the NGC Sale Assets to New NGC in accordance with the terms and conditions of the Plan, the Assets Purchase Agreement and the other related Plan Documents. The NGC Sale Assets shall be sold, assigned, transferred, and conveyed to New NGC: *(1)* free and clear of all Liens, Claims, Interests and other liabilities, obligations, charges, or encumbrances thereon or thereagainst of whatever type or description to the maximum extend permitted by the Bankruptcy Code, including: *(A)* those of the kind specified in sections 502(g), (h), and (i) of the Bankruptcy Code, and *(B)* preferential rights or rights of first refusal of any kind or nature whatsoever, whether direct or indirect, absolute or contingent, matured or unmatured, liquidated or unliquidated, of, by, or against

NGC or the NGC Sale Assets, *except* as otherwise provided in the Plan; and (2) with respect to contracts or leases assigned or transferred, notwithstanding a provision in any contract or lease (including, without limitation, mineral and gypsum deposit leases) or any applicable law that prohibits, restricts or conditions the assignment or transfer of that contract or lease, including all preferential rights or rights of first refusal of any kind or nature whatsoever, pursuant to section 365(f) of the Bankruptcy Code; *provided* that such prohibition, restriction or condition of assignment or transfer shall be negated only with respect to transfers and assignments effected pursuant to the Assets Purchase Agreement and the other Plan Documents as contemplated by the Plan, and that such prohibitions, restrictions and conditions of assignment shall otherwise remain in full force and effect and a part of the contract or lease so assigned or transferred. NGC and New NGC are authorized and empowered to take such actions and do such things and incur such reasonable costs and expenses as may be necessary and required to implement and effectuate the Assets Sale pursuant to the Plan, the Assets Purchase Agreement, the other Plan Documents, and this Order.

(b) ***Binding Effect of Assets Sale.*** The transfers of the NGC Sale Assets by NGC to New NGC are or will be legal, valid and effective assignments, conveyances and transfers of such assets and properties authorized by a Plan confirmed under the Bankruptcy Code.

7. ***Further Authorizations.*** The Debtors, Reorganized NGC, New NGC, the NGC Asbestos Settlement Fund, Austin, and each other Person having duties or responsibilities

under the Plan, the Plan Documents or this Order, and their respective directors, officers, general partners, agents, representatives (including, where applicable, the Fund Administrators), and attorneys, are authorized, empowered and ordered to carry out all of the provisions of the Plan and the Plan Documents, to issue, execute, deliver, file, and record, as appropriate, the Plan Documents and to take any action contemplated by the Plan, the Plan Documents or this Order, and to issue, execute, deliver, file, and record, as appropriate, such other contracts, instruments, releases, indentures, mortgages, deeds, bills of sale, assignments, leases, or other agreements or documents, and to perform such other acts and execute and deliver such other documents as are consistent with and necessary or appropriate to implement, effectuate and consummate the Plan, the Plan Documents and this Order and the transactions contemplated thereby and hereby, all without further application to, or Order of, the Court or further action by their respective directors, stockholders or beneficiaries, and with like effect as if such actions had been taken by unanimous action of the respective directors, stockholders or beneficiaries of such entities. All such additional agreements, documents and instruments shall be deemed to be "*Plan Documents*" for purposes of the Plan and this Order. The Secretary or any Assistant Secretary of the Debtors, Reorganized NGC, New NGC, and Austin shall be, and hereby is, authorized to certify or attest to any of the foregoing actions. The Debtors, Reorganized NGC, New NGC, the NGC Asbestos Settlement Fund, and Austin are further authorized, empowered and ordered to cause to be filed with the Secretary of State or other applicable officials of any applicable Governmental Units any and all certificates, agreements, or plans of merger,

dissolution, liquidation, or amendment necessary or appropriate to effectuate the transactions contemplated by the Plan, the Plan Documents and this Order, and amended and restated certificates or articles of incorporation and by-laws or certificates or articles of amendment and all such other actions, filings, or recordings as may be required under appropriate provisions of the applicable laws of all applicable Governmental Units, or as any of the officers of the Debtors, Reorganized NGC, New NGC, or Austin or the Fund Administrators, acting on behalf of the NGC Asbestos Settlement Fund, may determine are necessary or appropriate. The execution of any such document or the taking of any such action shall be, and hereby is, deemed conclusive evidence of the authority of such Person to so act. This Order shall constitute all approvals and consents, if any, required by the General Corporation Law of the State of Delaware and all other applicable business corporation, trust, and other laws of the applicable Governmental Units with respect to the implementation and consummation of the Plan.

8. ***Discharge and Release of Claims.***

(a) ***Discharge of Debts.*** Pursuant to section 1141(d) of the Bankruptcy Code, the Debtors are discharged, effective as of the Confirmation Date, of and from each and every "*debt*" (as that term is defined in section 101(12) of the Bankruptcy Code) that arose before the Confirmation Date and any debt of a kind specified in sections 502(g), (h) and (i) of the Bankruptcy Code, whether or not: *(1)* a proof of claim based on such debt or Claim was filed or deemed filed under section 501 of the Bankruptcy Code; *(2)* such Claim

is allowed under section 502 of the Bankruptcy Code; or *(3)* the holder of such Claim has accepted the Plan. In addition, the Confirmation of the Plan terminates all Interests (and all rights with regard thereto) of the Interestholders of the Debtors as provided in the Plan.

(b) ***Discharge of Claims and Interests.*** Pursuant to ***Section 6.2*** of the Plan, the entry of this Order shall (unless otherwise expressly provided in the Plan or this Order) act as a full and complete discharge of all Claims (including, without limitation, all Current Asbestos Disease Claims) against or Interests in the Debtors (or any one of them), of any nature whatsoever, including, without limitation, any liability of a kind specified in sections 502(g), (h) and (i) of the Bankruptcy Code, that arose, or has been asserted against, the Debtors (or either of them) at any time before the entry of this Order or that arises from any pre-Confirmation conduct of the Debtors (or either of them) whether or not the Claim is known to or knowable by the Claimant or Interestholder. The discharge of the Debtors will become effective as to each Claim and Interest, whether or not the Claim or Interest constituted an Allowed Claim or Allowed Interest and whether or not the holder of the Claim or Interest voted to accept the Plan. In addition, this Order will operate as a general resolution with prejudice, as of the Effective Date, of all pending legal proceedings against the Debtors and their respective assets and properties as well as any proceedings not instituted against the Debtors or their respective assets and properties, *except* as otherwise provided in the Plan and this Order. As provided in section 524(a)(2) of the Bankruptcy Code, the discharge herein provided operates as an injunction against the prosecution against

the Debtors, Reorganized NGC and New NGC of any Claim or Interest so discharged.

9. Establishment of NGC Asbestos Settlement Fund; Bar of Punitive Damages; and Other Implementing Orders.

(a) ***General.*** Unless otherwise expressly provided in the Plan or this Order, the establishment of the NGC Asbestos Settlement Fund shall, pursuant to ***Sections 5.1(d)*** and ***5.1(j)*** of the Plan, extinguish all liabilities of the Debtors to the Claimants holding Current Asbestos Disease Claims and Asbestos Property Damage Claims, including such Claims against Affiliates and Subsidiaries (other than Austin or any subsidiaries of Austin), and the liability therefor shall be limited to and satisfied *solely* from the NGC Asbestos Settlement Fund Assets, and, other than NGC's obligation to establish the NGC Asbestos Settlement Fund and New NGC's obligation to fund the Asbestos Fund Expenses Commitment, as provided in the Plan, the Debtors, their respective Affiliates and Subsidiaries, and New NGC shall not have any further financial or other responsibility for Current Asbestos Disease Claims or Asbestos Property Damage Claims or for Asbestos Fund Expenses. Current Asbestos Disease Claims and Asbestos Property Damage Claims shall be liquidated through the applicable Asbestos Claims Resolution Facility and the liabilities of the Debtors, Reorganized NGC and New NGC, if any, for such Claims shall be limited and channelled to the NGC Asbestos Settlement Fund Trust for all purposes. As provided in § 5.1(d) of the Plan, the provisions of that Section must be read pursuant to this Order. Accordingly, this Order governs, and the defined term of Asbestos Claims in that section is

superseded by the defined terms Current Asbestos Disease Claims and Asbestos Property Damage Claims. As provided by the Bankruptcy Code, the discharge provisions of § 5.1(j) apply and are limited to Claims.

(b) ***Unknown Asbestos Disease Claims.*** The NGC Asbestos Settlement Fund shall to the extent feasible extinguish Unknown Asbestos Disease Claims. Unknown Asbestos Disease Claims shall be channelled to the NGC Asbestos Settlement Fund for resolution. Unknown Asbestos Disease Claimants shall be and are hereby made beneficiaries of the NGC Asbestos Settlement Fund. The liabilities of the Debtors and Reorganized NGC, if any, for Unknown Asbestos Disease Claims shall be limited and channelled to the NGC Asbestos Settlement Fund. New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims pending exhaustion of the remedy or remedies provided by the NGC Asbestos Settlement Fund.

(c) ***Punitive Damages Barred.*** All Claimants holding Asbestos Claims and all Persons who hereafter may assert Asbestos Claims (including, without limitation, Unknown Asbestos Disease Claimants) shall be, and hereby are, forever barred from asserting punitive damages against the Debtors, the NGC Asbestos Settlement Fund, New NGC, or Reorganized NGC. Notwithstanding the foregoing, in any case where a death was caused, if the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, then Claimants holding Asbestos Disease and/or Persons who hereafter may assert Asbestos Disease Claims

shall not be barred from assertion of Claims against the NGC Asbestos Settlement Fund for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the Persons, respectively, for whose benefit the action was brought, *in lieu* thereof.

(d) ***NGC Asbestos Settlement Fund.*** Within the meaning of section 468B of the IRC and the regulations issued thereunder, but without prejudice to any other or additional definitions or provisions of the Plan and the related Plan Documents, the NGC Asbestos Settlement Fund is intended to be a "*qualified settlement fund*":

(1) which is hereby established pursuant to the Court's order to extinguish the Debtors' liability in tort, contract or otherwise, with respect to all Asbestos Claims against the Debtors including, without limitation, Asbestos Disease Claims (both Current Asbestos Disease Claims and Unknown Asbestos Disease Claims) and all Asbestos Property Damage Claims;

(2) under the terms of which the money or property of the Debtors which is to be transferred to the NGC Asbestos Settlement Fund pursuant to the terms of the Plan, as described therein, constitutes "*qualified payments*" within the meaning of the IRC;

(3) which has been or shall be established for the principal purpose of resolving and satisfying Asbestos Claims against the Debtors arising out of, or related to, personal injury, death, or property damage from, or in any way related to, asbestos or asbestos-containing products of the Debtors; and

(4) under the terms of which the Debtors may not hold any beneficial interest in the income or corpus of such funds.

(e) Fund Status Reports.

(1) Pursuant to ***Section 5.1(m)(1)*** of the Plan, the Fund Administrators are directed to file with the Court, *no later* than 180 days following the Effective Date and every 180 days thereafter (each 180-day period being herein called a "***Reporting Period***"), a report for each such Reporting Period ("***Fund Status Report***"), containing the following information:

(A) the number of Asbestos Claims filed against the NGC Asbestos Settlement Fund;

(B) the number of Asbestos Claims resolved during the Reporting Period in question, statistical information (to the extent such information is reasonably available) concerning the occupational and disease mix of those Asbestos Disease Claims which are resolved during such Reporting Period, and the aggregate amounts paid by the NGC Asbestos Settlement Fund in resolving such Asbestos Claims;

(C) the status of the NGC Asbestos Settlement Fund Assets remaining in the NGC Asbestos Settlement Fund to resolve Asbestos Claims;

(D) the status of the participation of Reorganized NGC and/or the NGC Asbestos Settlement Fund in the Center for Claims Resolution; and

(E) such other information as the Court may, from time to time, require.

(2) Each Fund Status Report shall be filed under seal; ***subject***, ***however***, to the Court providing a procedure for removal of such seal.

(3) The Court may conduct a hearing on the matters raised by each Fund Status Report within 30 calendar days after the filing of each such Fund Status Report or as soon thereafter as the Court can schedule and notice such a hearing.

(f) Appeal of Definition of Unknown Asbestos Disease Claim and Scope of Injunction and Channelling Order. Notwithstanding any other provision of this Order or of the Technical Modifications but subject to an order of an appellate court, the Court shall permit the Debtors to implement the terms of the Plan even though the Debtors (or either of them) or any other party in interest in the Reorganization. Cases elects to appeal the Court's determination of the definition of "*Unknown Asbestos Disease Claim*", as such term is defined in the Third Modification, and/or the scope of the injunction and channelling order to be issued by the Court under section 524(a)(2) of the Bankruptcy Code and the Plan in connection therewith. Since this Order is drafted to enable an appellate court to address that issue, in the event of an appeal, and to

implement an appellate court mandate, the Plan may be implemented without further modification *except* to the extent necessary to conform the Plan to the order of such appellate court. The right of any party in interest, including, without limitation, the Debtors (or either of them), to appeal the issues described in this ***Section 9(e)*** shall not be waived, impaired or limited in any way by the Technical Modifications.

(g) ***Implementing Orders Regarding the Asbestos Claims Resolution Facilities.*** Pursuant to ***Section 5.1(m)(1)*** of the Plan, the Court further orders the following:

(1) ***Implementation of Asbestos Claims Resolution Facilities.*** Pursuant to ***Section 5.1(m)(1)*** of the Plan and this Order, the Center for Claims Resolution is approved as the Asbestos Disease Claims Resolution Facility from and after the Effective Date; *provided, however*, that should any of the events described in ***Sections 5.1(m)(2)(A)*** through ***(E)*** of the Plan occur, the Alternate Asbestos Disease Claims Resolution Facility shall become the Asbestos Disease Claims Resolution Facility pursuant to the Plan; *subject, however*, to further Orders of the Court. In addition, the implementation of the Asbestos Property Damage Claims Resolution Facility is authorized as of the Effective Date pursuant to the terms and conditions set forth in the Plan and the NGC Asbestos Settlement Fund Documents. The Debtors, New NGC, Reorganized NGC, and the NGC Asbestos Settlement Fund, and their respective officers, directors, agents, and representatives (including the Fund Administrators) are authorized, empowered and ordered

to take all actions they deem necessary or appropriate to implement, effectuate and consummate the transactions contemplated by the NGC Asbestos Settlement Fund Documents and the Asbestos Claims Resolution Facilities.

(2) ***Additional Claims Settlement Procedures.*** If the Court orders the Fund Administrators to cease participation in the Center for Claims Resolution for any reason, including, without limitation: *(A)* that certain Stipulation of Settlement Between the Class Claimants and Defendants Represented by the Center for Claims Resolution, dated as of January 15, 1993 (the "*Class Action Settlement*"), is not approved by the appropriate court and made binding on the NGC Asbestos Settlement Fund; *(B)* the Court determines that the Insurance Coverage for Asbestos Claims provided by the Insurance Policies is *less than* $500 million; *(C)* Austin cannot be sold by the NGC Asbestos Settlement Fund for consideration approximately equal to $125 million; or *(D)* the Court determines that the procedures of the Center for Claims Resolution for settling and paying Asbestos Disease Claims will not permit the NGC Asbestos Settlement Fund to fulfill its purpose and responsibilities to persons holding Asbestos Disease Claims (including, without limitation, Unknown Asbestos Disease Claims) or provide the asbestos-related litigation protection to New NGC which is necessary to assure that New NGC has an enterprise value of $350 million on the effective date, as contemplated by the Plan and this Order:

(i) The Court will direct the Fund Administrators to adopt the Alternate Asbestos Claims Resolution Facility as the means of liquidating and resolving Asbestos Claims pursuant to the Plan with additional settlement criteria similar to that set forth in ***Section 9(f)(2)(D)(ii)*** of this Order which will insure that the purpose of the NGC Asbestos Settlement Fund is accomplished and the asbestos-related litigation protection for New NGC which is necessary to assure that New NGC has an enterprise value of $350 million on the effective date, as contemplated by the Plan and this Order, is provided (the "*Additional Claims Settlement Procedure*").

(ii) If the Fund Administrators fail to adopt Additional Claims Settlement Procedures that are satisfactory to the Court within the time period set by the Court, the Court will establish Additional Claims Settlement Procedures which will be designed to insure that the NGC Asbestos Settlement Fund fulfills its purpose which gave New NGC an enterprise value of $350 million on the effective date. In establishing such Additional Claims Settlement Procedures, the Court may, among other matters, consider the settlement procedures set forth in the Class Action Settlement, including such factors as: *(aa)* sufficient evidence of exposure to NGC asbestos or asbestos-containing products; *(bb)* establishment of compensable medical categories of asbestos-related diseases; *(cc)* compensation levels for various asbestos-related diseases based on medical criteria;

(dd) compensation levels for asbestos-related diseases that do not meet the medical criteria but would be compensable under the applicable tort law; *(ee)* claims submission and payment procedures, including submission of claims without assistance of counsel; *(ff)* procedures for the payment of extraordinary Asbestos Disease Claims; *(gg)* limitations on jury trials and the use of alternate dispute resolution procedures to resolve Asbestos Disease Claims; and *(hh)* limitations on the recovery of attorneys' fees in connection with the representation of persons asserting Asbestos Disease Claims against the NGC Asbestos Settlement Fund. The Court may also impose a percentage payment schedule.

(iii) The provisions of this order shall also apply if the Alternate Asbestos Disease Claims Resolution Facility is utilized by the Fund Administrators and they do not adopt additional settlement criteria.

(iv) If the Fund Administrators remain in the Center for Claims Resolution and the Class Action Settlement is approved and binding on the Fund Administrators, they must provide for a facility to resolve Asbestos Disease Claims of persons who opt out of the Class Action. The facility may be the Center or the Alternate Asbestos Disease Resolution Facility and shall be subject to the NGC Asbestos Settlement Fund, the Plan and this Order.

(h) ***Status of Fund Advisory Committees and Resolution of Disputes.*** The Fund Advisory Committees

shall not frustrate or impede, in any way, the Fund Administrators in the performance of their respective fiduciary duties and obligations under the Plan and the NGC Asbestos Settlement Fund Documents. In the event of any disagreement, dispute or question that arises either: *(1)* between the Fund Advisory Committees (or either of them) and the Fund Administrators; *(2)* among the Fund Administrators; or *(3)* among the members of either of the Fund Advisory Committees, such disagreement, dispute or question will be resolved by the Court upon proper notice and hearing. The NGC Asbestos Settlement Fund Documents shall be amended to incorporate this ruling. The Fund Advisory Committees constitute advisory bodies only. Should either committee withhold consent contemplated by the Plan to an action to be taken by the Fund Administrators, the Administrators may apply for court authorization to act.

10. ***Injunction and Channeling Orders.***

(a) ***Injunction – Discharged Debts.*** Pursuant to ***Section 6.5(a)*** of the Plan, *(1)* all Persons who have held, hold or may hold Claims, including, without limitation, Current Asbestos Disease Claims and Asbestos Property Damage Claims or who have held, hold or may hold Existing Aancor Common Stock or Existing NGC Securities, and *(2)* the Debtors, New NGC, Reorganized NGC, and the NGC Asbestos Settlement Fund, Austin, and any of their respective officers, directors, employees, representatives (including the Fund Administrators), Affiliates or Subsidiaries are permanently enjoined on and after the Confirmation Date from: *(A)* commencing or continuing in any manner any action or other proceeding of any kind with respect to any

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Claim against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Claim or Interest; *(B)* the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person with respect to any such Claim or Interest; *(C)* creating, perfecting or enforcing any encumbrance of any kind against the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; *(D)* asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtors, New NGC, Reorganized NGC,

the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Claim or Interest; and *(E)* any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of the Plan, the Plan Documents, the NGC Asbestos Settlement Fund Documents or this Order; *provided, however*, nothing contained in this Order shall impair (i) the rights of Persons with Current Asbestos Disease Claims and Asbestos Property Damage Claims to assert such Claims against the NGC Asbestos Settlement Fund or against Reorganized NGC, if necessary, in accordance with the NGC Asbestos Claims Resolution Procedures, *(ii)* the rights of Reorganized NGC, New NGC, or the Fund Administrators, as the case may be, to take such action as may be necessary in the enforcement or prosecution of any Debtor Action, Insurance Debtor Action, Asbestos Insurance Debtor Action, or other cause of action which may exist on behalf of the Debtors and which may not have been enforced or prosecuted by the Debtors, which Debtor Action, Insurance Debtor Action, or other causes of action shall survive Confirmation of the Plan and shall not be affected thereby *except* as specifically provided in this Order, or *(iii)* any rights Colon Brown, Sr. may have with respect to liabilities of any other entity on, or the property of any other entity for, the claims of Colon Brown, Sr., including, but not limited to, any rights he may have

against officers, directors, and employees of the Debtors, both past and present.

(b) ***Channeling Order – Unknown Asbestos Disease Claims.***

(1) ***Injunction and Channeling Order.*** Pursuant to ***Section 6.5(b)*** of the Plan, all Persons who have held, hold or may hold Unknown Asbestos Disease Claims are made beneficiaries of the NGC Asbestos Settlement Fund and, pending exhaustion of the remedies of that Fund to resolve Unknown Asbestos Disease Claims, are enjoined (subject, however, to the provisions of ***Section 10(b)(2)*** of this Order) on and after the Confirmation Date from: *(A)* commencing or continuing in any manner any action or other proceeding of any kind with respect to such Unknown Asbestos Disease Claim against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Unknown Asbestos Disease Claim; *(B)* the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than

Austin or its Subsidiaries), the Insurance Companies, or any Person with respect to any such Unknown Asbestos Disease Claim; *(C)* creating, perfecting or enforcing any encumbrance of any kind against the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates, or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any Person or against the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Unknown Asbestos Disease Claim; *(D)* asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives Affiliates or Subsidiaries (other than Austin or its Subsidiaries), the Insurance Companies, or any other Person or against the property of the Debtors, New NGC, Reorganized NGC, or any of their respective officers, directors, employees, representatives, Affiliates or Subsidiaries (other than Austin or its Subsidiaries), or any other Person with respect to any such Unknown Asbestos Disease Claim; and *(E)* any act, in any manner, in any place whatsoever, that does not conform to, or comply with, the provisions of the Plan, the Plan Documents, the NGC Asbestos Settlement Fund Documents, or this Order; *provided, however*, nothing contained in this Order shall impair the rights of any Unknown Asbestos Disease Claimant to assert its Unknown Asbestos Disease Claim against

the NGC Asbestos Settlement Fund or against Reorganized NGC, if necessary, in accordance with the NGC Asbestos Claims Resolution Procedures. The liabilities of the Debtors for Unknown Asbestos Disease Claims shall be, and hereby are, channelled and limited to the NGC Asbestos Settlement Fund.

*(2) **Limitations on Injunction and Channelling Order Regarding Asbestos Disease Claims.*** Nothing contained in ***Section 10(b)(1)*** of this Order, however, shall preclude an Unknown Asbestos Disease Claimant from pursuing his rights, if any, under applicable non-bankruptcy law against any Person who may be liable to such Unknown Asbestos Disease Claimant after exhausting the remedy or remedies provided by the NGC Asbestos Settlement Fund. The Unknown Asbestos Disease Claimant shall have exhausted the NGC Asbestos Settlement Fund remedy or remedies and the channelling order shall be terminated as to that Unknown Asbestos Disease Claimant if the NGC Asbestos Settlement Fund ceases to exist without or before resolving that Unknown Asbestos Disease Claim or upon order of this court finding that the Fund cannot resolve that Unknown Asbestos Disease Claim, whichever occurs first. Nothing contained in this ***Section 10(b)(2)*** or elsewhere in this Order shall constitute an admission of any liability or obligation for any Unknown Asbestos Disease Claim.

*(3) **Tolling of Statutes of Limitations on Unknown Asbestos Disease Claims.*** So long as the NGC Asbestos Settlement Fund is resolving Asbestos Disease Claims

through the Center for Claims Resolution, such Asbestos Disease Claims will be subject to, and governed by, the applicable statute of limitations of the applicable Governmental Units. If, however, the NGC Asbestos Settlement Fund ceases to resolve Asbestos Disease Claims through the Center for Claims Resolution and adopts the Alternate Asbestos Disease Claims Resolution Facility to resolve Asbestos Disease Claims, the applicable statute of limitations regarding any unresolved Unknown Asbestos Disease Claims (which was not time barred as of the date the NGC Asbestos Settlement Fund ceased to participate in the Center for Claims Resolution) will be tolled until the termination of the channelling order pursuant to § 10(b)(2) of this Order.

11. ***Disallowed Claims and Disallowed Interests.*** On and after the Effective Date, the Debtors will be fully and finally discharged of any obligation on a Disallowed Claim or Interest. ***Section 6.7*** of the Plan has no other force or effect.

12. ***LBO Settlement.*** Pursuant to Bankruptcy Rule 9019 and ***Section 6.8(a)*** of the Plan, and as consideration for the distributions and other benefits provided under the Plan, the Court approves the provisions of ***Section 6.8(a)*** of the Plan as, and such provisions shall constitute, a good faith compromise and settlement (the "*LBO Settlement*") of any LBO Actions or any other claims, causes of action, demands, or controversies relating to the LBO that have been or may be asserted by the Debtors (whether directly or on behalf of Claimants or Interestholders) against or involving the

Released Parties (or any of them), which LBO Settlement the Court has found to be in the best interests of the Claimants and the respective Estates of the Debtors and is fair, equitable and reasonable. The LBO Settlement is approved by the Court as a compromise and settlement of all such LBO Actions that the Debtors (and any Person suing derivatively or otherwise on any Debtors' behalf) may hold against the Released Parties. The prosecution of any LBO Action against any of the Released Parties by the Debtors or by any Person against any of the Released Parties or other non-debtor parties specified in ***Sections 6.8(a)*** as modified by the Third Modification and ***Section 6.8(c)*** of the Plan pursuant to the contractual release contained therein, whether directly, derivatively or otherwise, is permanently enjoined.

13. ***Preservation of Insurance Claims.*** The Debtors' discharge and release from all Claims as provided herein shall neither diminish nor impair the enforceability of any of the Insurance Policies, providing Insurance Coverage to the Debtors and certain other Persons, purchased by, or on behalf of, the Debtors and any other Person, and which may cover Claims against the Debtors and such Persons.

14. ***Ratification of Transactions.*** The Court ratifies transactions consistent with the provisions of the Plan and the Plan Documents effected by the Debtors during the period commencing on the Petition Date and ending on the Effective Date.

15. ***Actions Relating to Plan.*** Except for motions under Bankruptcy Rules 9023 and 9024, appeals under Rule 8001 or 28 U.S.C. § 1291 of this Order, or proceedings authorized

or contemplated by this Order, the Plan or any Plan Document, the commencement or continuation by, or on behalf of, the Debtors, Reorganized NGC, New NGC, the Legal Representative, the NGC Asbestos Settlement Fund, any Claimant or Interestholder of the Debtors, or any Person acting or purporting to act by, through, under or on behalf of any of the foregoing, of any action, the employment of process, or any act to assert a claim for relief in respect of: *(a)* any actions taken during the course of the Reorganization Cases; *(b)* the Plan or any Plan Document; *(c)* the approval for, or the formulation, negotiation, confirmation, or consummation of, the Plan or any Plan Document; *(d)* distributions, payments or transfers made under the Plan or any Plan Document; or *(e)* acts performed pursuant to the Plan or any Plan Document, is enjoined. This ***Section 15*** shall not impair or limit the jurisdiction retained by the Court hereunder or prohibit or impair the Debtors, Reorganized NGC, New NGC, the NGC Asbestos Settlement Fund or the Legal Representative from commencing proceedings in the Court, or in any other court of appropriate jurisdiction to the extent permitted by the Plan or the Plan Documents, to enforce, preserve, or protect its respective rights and benefits under the Plan and the Plan Documents. Further, each holder of a Lien, title, or other right under the Plan or a Plan Document is authorized to exercise the rights and remedies set forth in the Plan, such Plan Document, or any other collateral security or other documents executed in connection therewith, all in accordance with their respective terms, and any and all of such rights and remedies may be exercised without need for any application to or further order of the Court or any other court.

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16. ***Debtor Actions.*** Except for those Debtor Actions, including the LBO Actions, which may be compromised and settled pursuant to the Plan and this Order, the Debtor Actions and the Insurance Debtor Actions shall be preserved and retained by the respective Debtors for enforcement subsequent to the Confirmation of the Plan, and on the Effective Date, such actions (other than the Retained Debtor Actions) shall be assigned to, and vested in, New NGC and New NGC shall be deemed to be a "*representative*" of the Estates of Aancor or NGC, as the case may be, New NGC being hereby so appointed, pursuant to ***Section 6.1*** of the Plan, by the Court for such purposes within the meaning of section 1123(b)(3)(B) of the Bankruptcy Code, without any further action by the Debtors, New NGC, Reorganized NGC, or the Court. Such Debtor Actions and Insurance Debtor Actions shall be so vested free and clear of all liens, security interests and other claims or causes of action. The Debtor Actions, the Insurance Debtor Actions, and the proceeds of the Debtor Action Recoveries (exclusive of the Retained Debtor Action Recoveries) and Insurance Debtor Action Recoveries shall be deemed to be part of: *(a)* in the case of NGC, the NGC Sale Assets; and *(b)* in the case of Aancor, the assets and property distributed to Claimants holding Allowed Claims against Aancor pursuant to ***Section 4.2*** of the Plan. New NGC may, at its option, apply the proceeds of any of NGC's Debtor Action Recoveries or Insurance Debtor Action Recoveries to the repurchase or payment, as the case may be, of New NGC Securities in such manner and amount as New NGC deems to be appropriate. The directors of New NGC may, in the exercise of their business judgment, without further authorization by the Court, prosecute, compromise, settle, dismiss, release, waive, or elect not to prosecute any

such Debtor Action, including, without limitation, any LBO Action against any Person who is not a "***Released Party***" under ***Section 6.8(a)*** of the Plan.

17. ***Retained Debtor Actions.*** The Retained Debtor Actions and the Retained Debtor Action Recoveries shall be preserved and vested as part of the NGC Asbestos Settlement Fund Assets pursuant to the Plan. The NGC Asbestos Settlement Fund, acting by and through the Fund Administrators, is appointed as "*representative*" of the Estate of NGC within the meaning of section 1123(b)(3)(B) of the Bankruptcy Code for the purpose of prosecuting such Retained Debtor Actions and collecting the Retained Debtor Action Recoveries.

18. ***Approval of the Fund Administrators.*** W. D. Hilton, Jr., Alan R. Kahn and Walter J. Taggert are appointed to be the Fund Administrators. Each Fund Administrator shall be deemed to be a "*party in interest*" in the Reorganization Case of NGC within the meaning of section 1109(b) of the Bankruptcy Code.

19. ***Interference with Plan.*** Except for proceedings brought in the Court, or pursuant to further Orders of the Court, the Debtors, Reorganized NGC, New NGC, the Legal Representative, the NGC Asbestos Settlement Fund, the Debtors' Claimants and Interestholders, and other parties in interest, and any Person acting or purporting to act by, through or under any of the foregoing, are hereby forever enjoined from commencing any action in any court seeking to: *(a)* modify any term of the Plan or any Plan Document, or any act taken or to be taken under the Plan or any Plan

Document, or *(b)* interfere with the receipt and retention of any distribution or transfer of property made or to be made under the Plan or any Plan Document, or any payment or performance of obligations under the Plan or any Plan Document. Notwithstanding the foregoing, nothing contained in this ***Section 19*** shall impair or limit the jurisdiction retained by the Court hereunder, including jurisdiction of actions brought to enforce rights granted under the Plan or the Plan Documents in accordance with ***Sections 10***, ***12*** and ***15*** of this Order nor the right of any person to appear before the United States District Court concerning the Class Action.

20. ***Settlement of NGC Senior Rights.*** Pursuant to ***Section 4.3(d)(7)(B)*** of the Plan, the Court approves the compromise and settlement of all claims or controversies relating to the release of all NGC Senior Rights that an NGC Senior Rightholder may have with respect to any Allowed Claim, or any distribution to be made pursuant to the Plan on account of such Claim.

21. ***Cancellation of Existing NGC Debt Securities and Existing NGC Indentures.*** Effective as of the Effective Date, in accordance with section 1141(d)(1) of the Bankruptcy Code, all Existing NGC Debt Securities, the Existing NGC Indentures, and all of the indentures or statements of resolution and other agreements heretofore binding upon NGC or its assets which pertain to any such Existing NGC Debt Securities are deemed void, canceled and of no further force or effect.

22. ***Vesting of Property.*** Except as otherwise provided in the Plan, any Plan Document or this Order, on the Effective

Date, in accordance with sections 1141(b) and (c) of the Bankruptcy Code, all of the assets and property of the Debtors' respective Estates, except for property sold or transferred pursuant to the Plan, and all other assets and property dealt with by the Plan, shall be and hereby is vested in the Debtors free and clear of all Liens, Claims, Interests, encumbrances, and charges of Claimants and Interestholders of the Debtors. Reorganized NGC and New NGC may operate their businesses on and after the Effective Date free of any restrictions imposed by the Bankruptcy Code or the Court.

23. ***Judgments.*** Except as provided in the Plan, on the Confirmation Date, any judgment at any time obtained, to the extent that such judgment is a determination of liability of the Debtors with respect to any debt or Claim discharged hereunder, is rendered null and void.

24. ***Transfers.*** All of the transfers of property of the Debtors' respective Estates provided for in the Plan and in the Plan Documents to be made on the Effective Date or a later date, including, without limitation, the transfers to New NGC, are deemed made as of the Effective Date or such later date, without any further action on the part of the Debtor, Reorganized NGC, New NGC, or any other Person, and without any requirement for filing or recording of documents of conveyance, and are valid and effective as of the Effective Date or such later date; *provided, however*, that after the Effective Date and as soon as practicable thereafter, the Debtor, Reorganized NGC and New NGC shall cooperate to make all filings and recordings which would otherwise be required under applicable state law to give notice of such transfers and conveyances to third parties.

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25. ***Liens.*** All of the Liens to be recognized, continued or created in favor of the holders of Class 2 Secured Claims against Aancor and Class 2 Secured Claims against NGC under the Plan or any Plan Document are deemed valid and perfected on, and to have a first priority as of, the date of original perfection if such Lien is recognized and confirmed under the Plan or the Plan Documents, or as of the Effective Date if created under the Plan or Plan Documents, without any further action on the part of the Debtors, Reorganized NGC, New NGC, or any other Person, and without any requirement of filing or recording of financing statements, deeds of trust, mortgages, or other evidence of such Liens. All of the Liens of the holders of Class 2 Claims for Aancor and NGC that are recognized and continued under the Plan or any Plan Document are deemed valid and perfected on, and to have a first priority as of, the date of original perfection without any further action on the part of the Debtors, Reorganized NGC, New NGC, or any other Person, and without any requirement of filing or recording of financing statements, mortgages, or other evidence of such Liens. Notwithstanding the foregoing, after the Effective Date, Reorganized NGC and New NGC shall cooperate to make all filings and recordings which would otherwise be required under applicable state law to give notice of such Liens to third parties and to obtain releases of the interests of parties holding Liens which are released under the Plan and Plan Documents.

26. ***Payments Under Plan.*** Except as otherwise provided in the Plan or in any other Order of the Court, all payments and other distributions to be made by the Debtors, Reorganized NGC, or New NGC under the Plan shall be

timely and proper if mailed by first class mail on or before the distribution date set forth in the Plan to either the address listed in such Person's notice of appearance (as amended) in the Reorganization Cases or the address listed in such Person's Proof of Claim filed in the Reorganization Cases, or, if neither of the foregoing is applicable, to the last known address of the Person entitled thereto.

*27. **Claims Bar Dates.***

(a) Bar Dates for Administrative Claims.

(1) General Bar Date Provisions. Except as provided below, requests for payment of Administrative Claims must be filed and served on the Debtors *no later* than 60 calendar days after the date of the entry of this Order (the "*Confirmation Order Date*"). Holders of Administrative Claims that are required to file and serve a request for payment of such Administrative Claims and that do not file and serve a request by the applicable bar date shall be barred from asserting such Claims against the Debtors or New NGC, or their respective assets or property. Objections to such requests must be filed and served on the Debtors or, if applicable, New NGC and the requesting party *no later* than 90 calendar days after the date of the entry of this Order.

(2) Bar Date for Certain Administrative Claims of Professionals.

(A) Professionals. Notwithstanding any provision to the contrary in any interim compensation

orders, professionals or other entities requesting compensation or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b), and 1103 of the Bankruptcy Code (including, without limitation, compensation or reimbursement requested pursuant to sections 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code by any professional or other Person for the making of any substantial contribution in either of the Reorganization Cases) shall file and serve on the Debtors, or, if applicable, New NGC an application for final allowance of compensation and reimbursement of expenses *no later* than 90 calendar days after the date of entry of this Order, which final application shall cover the period beginning with such professional or other Person's employment or participation in the Reorganization Cases, through the date of such final application; *provided, however*, that any professional who is entitled to receive compensation or reimbursement of expenses from the Estates of the Debtors pursuant to the previous Orders entered by the Court may continue to receive such compensation and reimbursement of expenses for services rendered after the Confirmation Order Date until the Effective Date, without further review or approval by the Court and without the retention of any holdback, unless such compensation or reimbursement is objected to by the Debtors or any other party in interest. In the event the Effective Date does not occur, all payments made after the Confirmation Order Date shall be subject to repayment to the Debtors upon order of this Court.

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Employment and payment of professionals for services rendered after the Effective Date shall be matters for Reorganized NGC, the NGC Asbestos Settlement Fund and New NGC, as the case may be. Objections to applications of professionals or other entities for compensation or reimbursement of expenses must be filed and served on the Debtors or, if applicable, New NGC and the requesting party *no later* than 150 calendar days after the date of entry of this Order. Pursuant to the Plan, final payments of professionals may not be made prior to the Effective Date.

*(B) **Ordinary Course Liabilities.*** Claimants holding Administrative Claims based on liabilities incurred by a Debtor in the ordinary course of its business (including Administrative Claims of Governmental Units for taxes) shall not be required to file or serve any request for payment of such Claims.

*(C) **Claims Under the GECC DIP Loan.*** Claimants holding Administrative Claims under, evidenced by or arising from the GECC DIP Loan shall not be required to file or serve any request for payment of such Claims. Such Claims shall be satisfied pursuant to ***Sections 5.19*** and ***5.20*** of the Plan.

*(b) **Bar Date for Rejection Damages Claims.*** If the rejection by a Debtor of an executory contract or unexpired lease pursuant to ***Section 7.2*** of the Plan gives rise to a Claim

by the other party or parties to such contract or lease, such Claim shall be forever barred and shall not be enforceable against the Debtors, Reorganized NGC, New NGC, or their respective successors or their respective properties, unless a Proof of Claim is filed and served on the applicable Debtor *no later* than 30 calendar days after the date of entry of this Confirmation Order. Objections to any such Proof of Claim must be filed and served on the applicable parties *no later* than 60 calendar days after the date of entry of this Order.

28. ***Objection Deadline.*** Pursuant to ***Section 5.12(a)*** of the Plan, objections to Claims (other than Asbestos Claims which are resolved by the NGC Asbestos Settlement Fund) and Interests shall be filed with the Court by the Persons entitled to file objections and served upon the United States Trustee and the Claimants and Interestholders holding such Claims and Interests to which objections are made *no later* than 180 calendar days after the date of entry of this Order, unless otherwise ordered by the Court.

29. ***Retention of Jurisdiction.***

(a) ***General Jurisdiction.*** Until the Reorganization Cases are closed, the Court shall retain the fullest and most extensive jurisdiction that is permissible, including that necessary to ensure that the purposes and intent of the Plan are carried out and to hear and determine all Claims set forth ***Article II*** of the Plan that could have been brought before the entry of this Order. Except as otherwise provided in the Plan, the Court shall retain jurisdiction to hear and determine all Claims against the Debtors and to adjudicate and enforce the Debtor Actions, including, without limitations, the

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Retained Debtor Actions, and all other causes of action, claims or demands which may exist or be asserted against or on behalf of the Debtors.

Following the Confirmation of the Plan, the Court shall further retain jurisdiction for the purpose of classification of any Claim of any Claimant and the re-examination of Claims which have been Allowed for purposes of voting, and the determination of such objections as may be filed with the Court against any Claim of any Claimant. The failure by the Debtors to object to, or examine, any Claim for the purposes of voting shall not be deemed a waiver of the right of the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or the Asbestos Claims Resolution Facilities, as the case may be, to object to or re-examine such Claim, in whole or part.

(b) ***Specific Jurisdiction.*** In addition to the foregoing, the Court shall, without limitation, retain jurisdiction !or the following specific purposes after the Confirmation of the Plan:

(1) to modify the Plan or any of the Plan Documents after Confirmation pursuant to the Bankruptcy Rules and the Bankruptcy Code;

(2) to assure the performance by Reorganized NGC, New NGC, Austin, the New NGC Senior Note Indenture Trustee, the Existing NGC Indenture Trustees, the Disbursing Agent(s), the New NGC Warrant Agent, the New NGC Transfer Agent (as hereinafter defined), and the Fund Administrators, of their respective obligations

to make distributions under the Plan, the Plan Documents, the Plan Securities Documents, the Existing NGC Indentures, and the NGC Asbestos Settlement Fund Documents;

(3) to enforce and interpret the terms and conditions of the Plan and the Plan Documents;

(4) to enter such Orders, including injunctions and channelling orders, as are necessary to enforce the title, rights and powers of Reorganized NGC, New NGC and the NGC Asbestos Settlement Fund, including, without limitation, Orders authorizing or directing amendments to the articles of incorporation and bylaws of Reorganized NGC or New NGC and Orders authorizing or directing amendments, extensions or waivers of the terms of the assets Purchase Agreement and the Plan Securities Documents, and to impose such limitations, restrictions, terms, and conditions on such title, rights and powers as the court may deem necessary;

(5) to enter an Order or Orders, concluding and terminating the Reorganization Cases;

(6) to enter such Orders as may be necessary to facilitate and effect the liquidation and disposition by Reorganized NGC of any of the Reorganized NGC Assets;

(7) to supervise, where required, liquidation by New NGC of the assets and property of Aancor;

(8) to correct any defect, cure any omission, or reconcile any inconsistency in the Plan, the Plan Documents, or this Order as may be necessary to carry out the purposes and intent of the Plan, including the adjustment of the date(s) of performance under the Plan, the Plan Documents, and any other documents related thereto in the event the Effective Date does not occur as provided herein, so that the intended effect of the Plan, the Plan Documents, and such other documents may be substantially realized thereby;

(9) to decide issues concerning tax reporting and withholding required by any applicable Governmental Unit and other tax issues which arise in connection with the Confirmation or Consummation of the Plan;

(10) to hear and determine all Debtor Actions and collect, compromise, discharge, and/or release all Debtor Action Recoveries and grant such other relief as may be appropriate thereto;

(11) to enforce and interpret the terms and conditions of the Assets Purchase Agreement and the other Plan Documents;

(12) to hear and approve all professional fees incurred before the Effective Date;

(13) to approve the appointment or dismissal of the Fund Administrators (or any of them) and their successors;

(14) to authorize actions by the Fund Administrators and to resolve all disputes, disagreements or questions between or among the Fund Administrators (or any of them) and the Fund Advisory Committees (or their respective members);

(15) to review and supervise, where necessary, and approve reports of the Fund Administrators, including the Fund Status Reports, as to: *(A)* the actions of the Fund Administrators and the Fund Advisory Committees and their members, *(B)* the administration of the NGC Asbestos Settlement Fund, and *(C)* the disposition and distribution of the NGC Asbestos Settlement Fund Assets, and to direct, when appropriate, the Fund Administrators to take actions necessary to the performance of the NGC Asbestos Settlement Fund;

(16) to hear and determine any causes of action arising during the period from the Petition Date through the Effective Date or in any way related to the Plan or the transactions contemplated thereby against the Debtors, Reorganized NGC, New NGC, the NGC Asbestos Settlement Fund, the Official Committees, the Legal Representative, and their respective officers, directors, shareholders, members, attorneys, financial advisors, representatives, and agents;

(17) to determine any and all applications pending on Confirmation for the rejection, assumption or assignment of executory contracts or unexpired leases and the allowance of any Claim resulting therefrom;

(18) to determine such other matters and for such other purposes as may be provided in this Order;

(19) to consider and act on the compromise and settlement of any Claim against or Interest in the Debtors or their Estates;

(20) to determine all disputes, disagreements, or questions regarding title to the assets of the Debtors or their Estates;

(21) to construe, enforce and resolve all questions and disputes relating to collective bargaining or employment agreements existing or approved by the Court at or before Confirmation;

(22) to construe and take any action to enforce any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement and the releases executed and exchanged in connection therewith, and to issue such Orders as may be necessary for the implementation, execution and consummation of any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement, and to determine all questions and issues arising under or with respect to any Insurance Settlement Agreement or Asbestos Insurance Settlement Agreement;

(23) to approve or authorize the Fund Administrators and/or Reorganized NGC to participate in the settlement of or to request the voluntary dismissal of the Stonewall Litigation;

(24) to enter such Orders as are necessary to enforce, implement, or modify the Asbestos Claims Resolution Facilities (or either of them, including, without limitation, all Orders as are necessary to establish Additional Claims Settlement Procedures for the settlement and payment of Asbestos Disease Claims by the NGC Asbestos Settlement Fund pursuant to the Alternate Asbestos Disease Claims Resolution Facility);

(25) to enter such Orders as are necessary to *(A)* continue or terminate the participation of Reorganized NGC (or any successor thereto) in the Center for Claims Resolution or *(B)*, if applicable, approve the participation by Reorganized NGC and the NGC Asbestos Settlement Fund in the Class Action Settlement; and

(26) where applicable, to enter such Orders as are necessary to approve the terms and conditions of any of the Plan Documents.

To the extent that the Court shall not have jurisdiction over a particular matter or the jurisdiction of the Court shall not be exclusive, or the Court shall decline to hear or shall abstain from hearing a particular matter, Claimants may bring proceedings pursuant to ***Sections 10***, ***12*** and ***15*** of this Order in any court with jurisdiction over such matter and the parties thereto.

30. ***Termination of Existing NGC Securities and Existing Aancor Common Stock.*** On the Effective Date: *(a)* the Existing NGC Securities (and the rights of the

Interestholders therein) shall be deemed to be terminated, canceled, and extinguished in accordance with ***Section 5.6*** of the Plan; and *(b)* the Existing Aancor Common Stock (and the rights of the Interestholders therein) shall be deemed to be terminated, canceled, and extinguished in accordance with ***Section 5.7*** of the Plan, and no consideration shall be paid or delivered with respect thereto, except as otherwise provided in the Plan or the Plan Documents and in all events, without any action on the part of the Interestholders thereof.

31. ***Issuance of Plan Securities.*** Any and all Plan Securities and Other Securities (as hereinafter defined), if any, offered, sold and/or issued pursuant to the Plan are deemed to have been offered, sold and/or issued pursuant to section 1145 of the Bankruptcy Code. Pursuant to section 1145 of the Bankruptcy Code, the exemption of the offer and sale of securities from the registration requirements of the Securities Act of 1933, as amended (the "*Securities Act*"), and any state or local law requiring registration for the offer or sale of a security, applies with respect to: *(a)* the Plan Securities distributed pursuant to the Plan; *(b)* the New NGC Common Stock issued upon exercise of the New NGC Warrants; and *(c)* any other securities that may be deemed to be offered, sold, issued, or distributed pursuant to the Plan and the transactions contemplated thereunder (including, without limitation, any interests in the NGC Asbestos Settlement Fund, to the extent such interests constitute a security under the Securities Act) (collectively, "*Other Securities*"). Without limiting the generality of the foregoing:

(1) ***New NGC Securities.*** The offer, sale and issuance to NGC of the New NGC Securities, and the

distribution by NGC of the New NGC Securities to Claimants in exchange for their Claims against NGC, pursuant to the Plan, are exempt from the requirements of Section 5 of the Securities Act and all securities laws of all applicable Governmental Units pursuant to section 1145(a)(1) of the Bankruptcy Code;

(2) ***New NGC Warrant Shares.*** The offer, sale and issuance by New NGC of the New NGC Warrant Shares upon the exercise of the New NGC Warrants will be exempt from the requirements of Section 5 of the Securities Act and all securities laws of all applicable Governmental Units under section 1145(a)(2) of the Bankruptcy Code;

(3) ***Reorganized NGC Common Stock.*** The offer, sale and issuance by Reorganized NGC of the Reorganized NGC Common Stock pursuant to the Plan are exempt from the requirements of Section 5 of the Securities Act and all securities laws of all applicable Governmental Units pursuant to section 1145(a)(1) of the Bankruptcy Code; and

(4) ***Interests in the NGC Asbestos Settlement Fund.*** The offer, sale and issuance of interests in the NGC Asbestos Settlement Fund (to the extent such interests constitute a security under the Securities Act) in accordance with the Plan are exempt from the requirements of Section 5 of the Securities Act and all securities laws of all applicable Governmental Units pursuant to section 1145(a)(1) of the Bankruptcy Code.

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All of the Plan Securities to be distributed pursuant to the Plan shall be subject to the provisions of section 1145(b)(1) of the Bankruptcy Code relating to the definition of an underwriter in section 2(11) of the Securities Act, and compliance with rules and regulations of the SEC, if any, applicable at the time of any future transfer of such securities, and any restriction contained in the New NGC Registration Rights Agreement.

32. ***Record Date.*** The record date for purposes of determining holders of publicly traded securities, including the Existing NGC Debt Securities, that are entitled to receive distributions under the Plan shall be the Effective Date. Pursuant to Bankruptcy Rules 1007(i) and 3020(d) and section 1142(b) of the Bankruptcy Code, *(a)* the Existing NGC Indenture Trustees are hereby directed to disclose to New NGC the depository institutions ("*Depositories*") and such other transfer agents, street name holders and all other bank, broker and agent nominees listed as record holders of Existing NGC Debt Securities ("*Other Record Holders*") for which they act as trustees and, to the extent available, any Beneficial Owner Information (as defined below) within 10 calendar days after the Effective Date, *(b)* the Depositories are hereby directed to disclose to New NGC the lists of such transfer agents, street name holders and all other bank, broker and agent nominees in whose name Existing NGC Debt Securities are registered with the Depositories ("*Depository Record Holders*") and, to the extent available, Beneficial Owner Information, within 20 calendar days after the Effective Date, and *(c)* the Other Record Holders, the Depository Record Holders and all other transfer agents, street name holders and other bank, broker or agent nominee

record holders of Existing NGC Debt Securities that hold record title on behalf of beneficial owners of Existing NGC Debt Securities are hereby directed to provide to New NGC, within 30 calendar days after the Effective Date, the following information ("*Beneficial Owner Information*") with respect to those beneficial owners of Existing NGC Debt Securities on whose behalf they hold record title to Existing NGC Debt Securities, using the Effective Date as the record date:

(1) The name, address, and taxpayer identification or social security number of each such beneficial owner; and

(2) The amount and type of Existing NGC Debt Securities, identified by CUSIP (if available) or other identification number, owned by each such beneficial owner.

The directions contained in this paragraph shall apply and be effective notwithstanding the provisions of Rule 14b-1 and Rule 14b-2 promulgated by the SEC.

33. ***Transfer Taxes.*** Pursuant to ***Section 5.26*** of the Plan, the issuance, transfer or exchange of any security issued under the Plan or the Plan Documents, and the recognition, continuation, or creation of Liens on assets or property of the Debtors, Reorganized NGC or New NGC, or the transfer of any asset or property, pursuant to the Plan or the Plan Documents, or the making, delivery or recordation of an instrument of transfer under the Plan or the Plan Documents, shall not be taxed under any law imposing a stamp tax,

transfer tax or other similar tax or fee. All filing and recording officers or authorities responsible for the assessment or collection of any such tax or fee may rely on the terms of this Order for all such purposes.

34. ***Executory Contracts and Unexpired Leases.*** Pursuant to ***Article VII*** of the Plan and in accordance with sections 365 and 1123(b)(2) of the Bankruptcy Code, *except* for any and all executory contracts and unexpired leases and subleases of the Debtors that: *(a)* are identified on ***Exhibit F*** to the Plan as being assumed by the Debtors or assumed by the Debtors and assigned pursuant to the Plan and/or the Assets Purchase Agreement; *(b)* have been assumed, assumed and assigned, or rejected, as the case may be, by the Debtors pursuant to previous orders of the Court; or *(c)* are specifically treated otherwise under the Plan or in this Order, all executory contracts and unexpired leases and subleases shall be and hereby are rejected in accordance with the provisions of sections 365 and 1123(b)(2) of the Bankruptcy Code (without the need for a separate order granting such rejection) as of the Effective Date. Pursuant to ***Section 7.4*** of the Plan, the Court shall determine the dollar amount, if any, of the Claim of any Claimant seeking damages by reason of the rejection of any executory contract or unexpired lease; *provided* such Claimant files a Proof of Claim in the Court before the expiration of the time period set forth in ***Section 27(b)*** of this Order. To the extent such damages are finally Allowed by the Court, such Claimants shall thereafter become Claimants holding Aancor Class 3, NGC Class 3, or NGC Class 4A or 4B Claims, as the case may be, and shall receive distributions as Claimants holding Allowed Claims in such Classes pursuant to the Plan. The

Plan shall constitute notice to Persons who may assert a Claim for damages for the rejection of an executory contract or unexpired lease of the bar date set forth in ***Section 27(b)*** of this Order for filing a Proof of Claim in connection therewith; *provided, however*, that the Debtors shall have no obligation to notify such Persons that the Confirmation Date has occurred. The assumption of any executory contracts and unexpired leases which the Debtors have sought to assume pursuant to the Plan are approved in all respects; *provided, however*, that the Court shall retain jurisdiction to determine any disputes as to the amount of defaults, if any, required to be cured under section 365(b)(1) of the Bankruptcy Code with respect to any such executory contract or unexpired lease. The listing of a contract or lease on ***Exhibit F*** to the Plan shall not constitute an admission by either Debtor that such contract or lease is an executory contract or unexpired lease or that the Debtors, New NGC or Reorganized NGC has any liability thereunder. Each of the Debtors shall be, and hereby is, authorized: *(x)* at any time before the Effective Date, to amend ***Exhibit F*** to the Plan to delete any executory contract or unexpired lease listed thereon, thus providing for its rejection pursuant to ***Article VII*** of the Plan; or *(y)* at any time prior to 90 calendar days after the Effective Date, to amend ***Exhibit F*** to the Plan to add any executory contract or unexpired lease, thus providing for its assumption or assumption and assignment pursuant to ***Article VII*** of the Plan. The Debtors, Reorganized NGC or New NGC, as appropriate, shall provide notice of any amendments to ***Exhibit F*** to the Plan to the parties to the executory contracts or unexpired leases affected thereby and, if such amendments are made before the Effective Date, to the parties on the then applicable master service list in the Reorganization Cases.

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35. ***No Postpetition Interest for Creditors.*** Any claim for postpetition interest on any Claim is hereby disallowed.

36. ***Compromises.*** In addition to the LBO Actions, the Plan and its classification scheme also contains other compromises of various potential claims, rights and causes of action, including: *(a)* waiver of subordination to permit junior classes of claims to receive and retain the distributions provided for under the Plan; and *(b)* implicit waiver of rights, if any, to invoke section 510(b) of the Bankruptcy Code with respect to claims based upon the rescission, purchase or sale of Existing NGC Debt Securities. All such compromises embodied in the Plan and the classification scheme set forth in the Plan are reasonable and have been consented to and accepted by virtue of the acceptance of the Plan by each impaired Class of Claims and Interests. To the extent any such compromise requires another court to approve the terms thereof, all rights and defenses with respect thereto shall be fully reserved pending such approval.

37. ***Waiver of Subordination Rights.*** The distributions provided for holders of Claims and Interests shall not be subject to any Claim by another holder of a Claim or Interest by reason of any assertion of a contracted right of subordination.

38. ***Dissolution of the Official Committees and Discharge of the Legal Representative.***

(a) ***The Official Committee.*** On the Effective Date, except for motions for administrative expenses and motions under Bankruptcy Rules 9023 and 9024 and appeals under

Rule 8001 and 28 U.S.C. § 1291 concerning this Confirmation Order, the Trade and Bond Committee will be dissolved and the members thereof released and discharged of and from all further authority, duties, responsibilities, liabilities, and obligations related to, or arising from, the Reorganization Cases. In the event of a motion or appeal described in this paragraph to which the Committee is or may be a party, the Committee shall continue for the sole purpose of that motion or appeal until the entry of a final order or judgment on the matter. Committee fees and expenses incurred after the Effective Date shall be paid by and in the discretion of New NGC or by court order. Reorganized NGC and the NGC Asbestos Settlement Fund shall have no obligation for payment of any costs or expenses of the Trade and Bond Committee or its professionals incurred from or after the Effective Date. Pursuant to ***Section 11.10*** of the Plan, the Asbestos Committee will, after the Effective Date, continue to serve until: *(1)* the NGC Asbestos Settlement Fund has been created; *(2)* the NGC Asbestos Settlement Fund Assets (or the rights thereto) have been transferred to the NGC Asbestos Settlement Fund; and *(3)* the Fund Administrators are serving in their respective capacities, pursuant to the Plan and the NGC Asbestos Settlement Fund Documents; *provided, however*, that during the period after the Effective Date in which the Asbestos Committee continues to function, if any, the Asbestos Committee's function shall be strictly limited to participation in core and non-core related proceedings that affect Claimants holding Asbestos Claims and/or the recoveries of such Claimants under the Plan. Thereafter, the Asbestos Committee will be dissolved and its members released and discharged of, and from, all further authority, duties, responsibilities, liabilities, and obligations

related to, or arising from, the Reorganization Cases. Dissolution of the Asbestos Committee shall be subject to the same consideration for motions and appeals as apply in this paragraph to the Trade and Bond Committee. All compensation and reimbursement of expenses related to the service of the Asbestos Committee and its professionals incurred from and after the Effective Date shall be paid by and in the discretion of the NGC Asbestos Settlement Fund or by court order, and New NGC shall have no obligation for payment of any such costs and expenses of the Asbestos Committee or its professionals incurred from and after the Effective Date.

(b) ***Legal Representative.*** The Legal Representative will continue to serve after the Effective Date until discharged of his duties and obligations by the Court pursuant to a separate Order. The Legal Representative shall be an ex officio member of the Asbestos Disease Fund Advisory Committee of the NGC Asbestos Settlement Fund and, after the Effective Date, shall continue to represent the persons identified by Court Order entered April 14, 1992. Upon court order, the Legal Representative will be released and discharged of, and from, all further authority, duties, responsibilities, liabilities, and obligations related to, or arising from, the Reorganization Cases. From and after the Effective Date, the Legal Representative and all professionals employed by him will be compensated by the NGC Asbestos Settlement Fund, but only upon court order after notice and hearing, and New NGC shall have no obligation for the payment of any costs and expenses of the Legal Representative or his professionals incurred from and after the Effective Date.

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39. ***Unclaimed Property.*** Any New NGC Securities, Cash, or other assets and property to be distributed under the Plan (other than NGC Asbestos Settlement Fund Assets and Reorganized NGC Assets), which remain unclaimed or otherwise not deliverable to the Person entitled thereto before the *later of*: *(a)* 2 years after the Confirmation Date; or *(b)* 60 calendar days after an Order allowing such Person's Claim or Interest becomes a Final Order, shall become vested in, and shall be transferred and delivered to, New NGC for distribution pursuant to the Plan. In such event, such Person's Claim or Interest shall no longer be deemed to be "*Allowed*" and such Person shall be deemed to have no further Claim or Interest in respect of such distribution and shall not participate in any further distributions under the Plan.

40. ***Substantial Consummation.*** The substantial consummation of the Plan, within the meaning of section 1127 of the Bankruptcy Code, shall be, and hereby is, deemed to have occurred on the Effective Date.

41. ***Inadvertent Closing of Case.*** In the event the Reorganization Cases (or either of them) shall be inadvertently deemed closed or fully administered before the substantial consummation of the Plan, then such Reorganization Case(s) may be reopened pursuant to section 50(b) of the Bankruptcy Code and Rule 5010 of the Bankruptcy Rules for cause.

42. ***Notice of Confirmation Order.*** The Debtors shall promptly serve notice of the entry of this Order, together with notice of the last day for filing administrative expense claims, claims arising from the rejection of executory

contracts, and applications for allowances of compensation and/or reimbursement of expenses, pursuant to Bankruptcy Rules 2002(f)(7) and 3020(c), on all Claimants and Interestholders of the Debtors, the Existing NGC Indenture Trustees, the Legal Representative and any other Persons listed on the Debtors' master service list.

43. ***Publication Notice.*** The Debtors shall publish a notice, in the form set forth in *Exhibit A* hereto, as soon as practicable in: (a) *The Charlotte Observer*; (b) *The Dallas Morning News*; (c) *The New York Times* (national edition); and (d) *The Wall Street Journal* (national edition).

44. ***Service of Order.*** The Debtors shall mail a copy of this Order, as soon as reasonably practicable, but in any event *no later than* April 9, 1993, to all parties on the service list attached hereto as ***Exhibit B***.

45. ***Recordable Form.*** This Order shall be, and hereby is, declared to be in recordable form and shall be accepted by any filing or recording officer or authority of any applicable Governmental Unit for filing and recording purposes without further or additional orders, certifications or other supporting documents. Further, the Court hereby authorizes the Debtors to file a memorandum of this Order in any appropriate filing or recording office as evidence of the matters herein contained.

46. ***Immediate Effectiveness; Successors and Assigns.*** Immediately upon the entry of this Order, the terms of the Plan, the Plan Documents and this Order shall be, and hereby are, deemed binding upon each of the Debtors, Reorganized

NGC, New NGC, any and all holders of Claims and Interests (regardless of whether such Claims or Interests are impaired under the Plan or whether the holders of such Claims or Interests accepted or are deemed to have accepted the Plan), any and all non-Debtor parties to executory contracts and unexpired leases with any of the Debtors, each other party in interest in the Reorganized Cases, and the respective heirs, executors, administrators, successors, or assigns, if any, of any of the foregoing.

*47. **Continued Corporate Existence.*** Reorganized NGC and New NGC shall exist as of the Effective Date as separate corporate entities, with all of the powers of corporations under applicable law and without prejudice to any right to alter or terminate such existence (whether by merger or otherwise) under applicable state law. The Plan and the Plan Documents do not provide for, and when consummated will not constitute, the liquidation of all, or substantially all, of the assets and property of the Estate of NGC under section 1141(d)(3)(A) of the Bankruptcy Code. Reorganized NGC and New NGC shall operate their respective businesses and may use, acquire and dispose of property and compromise or settle any Claims or Interests without supervision or approval by the Court and free of any restrictions of the Court or the Bankruptcy Rules. Without limiting the foregoing, Reorganized NGC and New NGC may pay the respective charges that they incur on or after the Effective Date for professionals' fees, disbursements, expenses, or related support services without application to the Court.

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*48. **Effect on Existing Employment Agreements and Other Legal Obligations.*** The consummation of the Plan shall be, and hereby is, deemed not to constitute a change of ownership or change in control, as such terms are used in any employment, severance or termination agreement in effect on the Effective Date and to which either of the Debtors is a party or under any applicable law of any applicable Governmental Unit.

*49. **Approval of Officers and Directors of New NGC, Reorganized NGC and Austin.***

*(a) **New NGC.*** The following Persons are hereby approved as the New NGC Directors who will serve after the Effective Date and until the first meeting of the shareholders of New NGC:

Peter C. Browning
Reece A. Overcash, Jr.
Harry J. Leonhardt
Richard Masson
Vincent J. Naimoli
Eve T. Horwitz
James Morgens

*(b) **Reorganized NGC.*** The following Persons are hereby approved as the directors of Reorganized NGC who will serve in such capacity after the Effective Date and until the first meeting of shareholders of Reorganized NGC:

W. D. Hilton, Jr.
Alan R. Kahn
Walter J. Taggart

Such directors shall serve in such capacities for no additional compensation other than the compensation provided to them as Fund Administrators in the NGC Asbestos Settlement Fund Documents.

(c) ***Austin.*** In accordance with ***Section 5.5(b)*** of the Plan, Martin Dies and Russell Budd are designated by the Asbestos Committee to serve as directors of Austin between the Confirmation Date and the Effective Date, and are hereby approved. The Court hereby authorizes the board of directors of Austin, including the members designated by the Asbestos Committee and approved hereby, to serve from the Confirmation Date through the Effective Date.

50. ***Exoneration and Reliance.*** Pursuant to ***Section 5.22*** of the Plan and provided that the respective affiliates, officers, directors, shareholders, members, representatives (including the Legal Representative), attorneys, financial advisors, and agents of the Debtors, Reorganized NGC, New NGC, the Legal Representative, and the Official Committees act in good faith, they shall not be liable to any Claimant or other party with respect to any action, forbearance from action, decision, or exercise of discretion taken during the period from the Petition Date to the Effective Date in connection with: *(a)* the operation of the Debtors, the Debtors' Subsidiaries, New NGC, or Reorganized NGC; *(b)* the implementation of any of the transactions provided for, or contemplated in, the Plan or the Plan Documents, including the Assets Sale pursuant to the Assets Purchase Agreement, the NGC Asbestos Settlement Fund pursuant to the NGC Asbestos Settlement Fund Documents; or *(c)* the administration of the Plan or the assets and property

(including any Cash distributed to the Claimants holding Claims which are classified in NGC Class 3) to be distributed pursuant to the Plan and the Plan Documents other than for willful misconduct or gross negligence. The Debtors, Reorganized NGC, New NGC, the Official Committees, the Legal Representative, and their respective affiliates, officers, directors, shareholders, members, representatives, attorneys, financial advisors, and agents may rely upon the opinions of counsel, certified public accountants, and other experts or professionals employed by the Debtors, Reorganized NGC, New NGC, the Official Committees, and the Legal Representative, respectively, and such reliance shall presumptively establish good faith. In any action, suit or proceeding by any Claimant, Interestholder or other party in interest contesting any action by, or non-action of, Debtors, Reorganized NGC, New NGC, the Official Committees, the Legal Representative, or their respective affiliates, officers, directors, shareholders, members, representatives, attorneys, financial advisors, and agents as not being in good faith, the reasonable attorneys' fees and costs of the prevailing party shall be paid by the losing party and as a condition to going forward with such action, suit, or proceeding at the outset thereof, all parties thereto shall be required to provide appropriate proof and assurances of their capacity to make such payments of reasonable attorneys' fees and costs in the event they fail to prevail.

*51. **No Liability for Tax Claims.*** Unless a taxing authority of any applicable Governmental Unit has asserted a Claim against the Debtors before the appropriate bar date established therefor, and pursuant to ***Section 6.3*** of the Plan, no Claim of such authority will be Allowed against the

Debtors, Reorganized NGC, New NGC, or the NGC Asbestos Settlement Fund for taxes, penalties or interest arising out of the failure, if any, of the Debtors to have filed any tax return, including, but not limited to, any income tax return or franchise tax return in any prior year or arising out of an audit of any return for a period before the Petition Date.

52. ***Survival of the Debtors' Corporate Indemnities.*** In accordance with ***Section 7.5*** of the Plan, any obligations of the Debtors, pursuant to their respective corporate charters and bylaws, to indemnify their respective directors, officers, agents, employees, attorneys, and representatives with respect to all present and future actions, suits and proceedings against the Debtors or any of such officers, directors, agents, employees, attorneys, or representatives, based upon any act or omission related to service with, or for or on behalf of, the Debtors (to the extent that such obligations are not otherwise discharged pursuant to the Plan), shall not be discharged or impaired by Confirmation or Consummation of the Plan, but shall be deemed and treated as executory contracts that are assumed by the applicable Debtor pursuant to the Plan and section 365 of the Bankruptcy Code and assigned to New NGC as of the Effective Date; *provided, however*, that the above described indemnity obligations shall be limited to those officers, directors, employees, agents, attorneys, or representatives of the Debtors who have served in such capacities during the course of the Reorganization Cases. Accordingly, such indemnification obligations shall survive unaffected by the reorganization contemplated by the Plan and shall be performed and honored by New NGC regardless of the Confirmation of the Plan.

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53. ***Term of Injunctions or Automatic Stays.*** Unless otherwise provided in the Plan or by Order of the Court, all injunctions or automatic stays provided for in the Reorganization Cases pursuant to sections 105(a) or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date shall remain in full force and effect until the Consummation Date.

54. ***NGC Employee Benefit Plans.*** On the Effective Date, New NGC shall, in accordance with the Plan, assume and continue the NGC Employee Benefit Plans; *provided, however*, New NGC shall not assume or be obligated for payments under any executive deferred compensation plan or arrangement which was in effect on and pursuant to which payments were being made by NGC as of the Petition Date; *provided, further*, that any rights or remedies of Colon Brown, Sr. in the NGC Employee Benefit Plan shall be preserved and shall survive Confirmation subject to any subsequent determination by the Court, or a court of competent jurisdiction, of Colon Brown, Sr.'s rights with respect to any NGC Employee Benefit. Plan assumed by New NGC, including, but not limited to, any rights Colon Brown, Sr. may have with respect to the Supplemental Executive Benefit Plan and Debtor's policy adopted by the Compensation Committee of NGC in 1988 to annuitize certain benefits of participants in the Supplemental Executive Benefit Plan.

55. ***Antifraud Safe Harbor.*** The Debtors, New NGC, Reorganized NGC, and each of their respective employees, agents, and professionals, and all other Persons who participated in the formulation, negotiation, solicitation, approval, and confirmation of the Plan to have acted in good faith and in compliance with applicable provisions of the

Bankruptcy Code, and are entitled to the rights, benefits and protections of sections 1125(d) and 1125(e) of the Bankruptcy Code.

56. ***Solicitation Exemption.*** The distribution of the Disclosure Statement and solicitation of acceptance of the Plan from the Debtors' Claimants and Interestholders are exempt from federal proxy regulations pursuant to the express terms of section 1125(e) of the Bankruptcy Code.

57. ***Appointment of New NGC Indenture Trustee; Appointment of New NGC Warrant Agent and New NGC Transfer Agent.***

(a) ***New NGC Indenture Trustee.*** The Court approves the appointment of Continental Bank, N.A., as the New NGC Senior Note Indenture Trustee, as such term is defined and used in the Plan.

(b) ***New NGC Warrant Agent and New NGC Transfer Agent.*** The Court approves the appointment of Wachovia Bank of North Carolina, N.A., as the New NGC Warrant Agent, as such term is defined and used in the Plan, and as the transfer agent for the New NGC Common Stock (the "*New NGC Transfer Agent*").

58. ***Filing and Recording by Governmental Units.*** Each and every Governmental Unit shall be, and hereby is, directed to accept for filing and recording any and all of the Plan Documents and other agreements, documents and instruments necessary or appropriate to consummate the transactions contemplated by the Plan.

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59. ***Utilities.*** All utilities, including, without limitation, gas, electric, telephone, and sewer, that provide service to any premises occupied by either of the Debtors are directed to return to New NGC, either by setoff against postpetition indebtedness or by refund, within 30 calendar days after the Confirmation Date, all deposits provided by the Debtors pursuant to section 366(b) of the Bankruptcy Code.

60. ***Licenses and Permits.*** Each and every Governmental Unit shall be, and hereby is, *(a)* directed to renew all licenses or permits in the name of NGC or New NGC, and *(b)* except to the extent required by applicable law, directed to return to New NGC, whether by setoff against postpetition indebtedness or by refund, within 30 calendar days after the Confirmation Date, any deposits or escrowed funds held by such Governmental Unit.

61. ***Appeals.*** The reversal or modification of this Order on appeal shall not affect the validity of the Plan, the Plan Documents, or any other agreement, document, instrument or action authorized by this Order or under the Plan as to the Debtors, New NGC, Reorganized NGC, the NGC Asbestos Settlement Fund, or any other Person acting in good faith, whether or not that Person knows of the appeal, unless this Order is stayed pending appeal.

SIGNED this 9th day of March, 1993.

Dallas, Texas

s/ Steven A. Felsenthal
STEVEN A. FELSENTHAL,
UNITED STATES BANKRUPTCY JUDGE

[Exhibits have been intentionally omitted]

APPENDIX F — RELEVANT STATUTE 11 U.S.C. § 101(5)

TITLE 11 – BANKRUPTCY CHAPTER 1 – GENERAL PROVISIONS

§ 101 Definitions

* * *

(5) "claim" means —

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach or performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . .

Supreme Court, U.S.
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MAY 4 2001

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No. 00-1379

IN THE

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Petitioners,

v.

NATIONAL GYPSUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE LEGAL REPRESENTATIVE FOR UNKNOWN ASBESTOS DISEASE CLAIMANTS, THE BODILY INJURY TRUST ADVISORY COMMITTEE, AND THE CENTER FOR CLAIMS RESOLUTION IN SUPPORT OF THE PETITIONERS

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Having been unable to secure the respondent's consent, the proposed *amici curiae* hereby move under Supreme Court Rule 37.2(b) for leave to file the attached brief in support of the petition for a writ of certiorari herein.

This case involves the construction of a Bankruptcy Court order confirming the 1993 Plan of Reorganization of the debtor National Gypsum Company ("Old NGC"). The Legal Representative For Unknown Asbestos Disease Claimants ("Legal Representative") was appointed by the Bankruptcy

Court on April 13, 1992, and given "party in interest" status under the Bankruptcy Code to represent the interests of Unknown Asbestos Disease Claimants ("Unknown Claimants"), *i.e.*, individuals who did not hold legally cognizable asbestos personal injury claims against the debtor at the time the Plan of Reorganization was confirmed. Pet. App. 5a. The Bodily Injury Trust Advisory Committee ("the BI-TAC") was created by the Plan of Reorganization to consult and advise concerning the liquidation and resolution of asbestos disease claims in accordance with the terms and conditions of the Plan. The Center For Claims Resolution ("CCR") is a nonstock Delaware corporation established in 1988 to act as a claims handling facility for its member corporations named as defendants in asbestos personal injury suits.

The Plan of Reorganization divided the debtor's assets between two entities. Some of those assets, which are now essentially exhausted, went to the Asbestos Claims Management Corporation ("ACMC"), managed by the NGC Settlement Trust (collectively, "the Trust"), to be used to resolve claims brought by persons exposed to asbestos produced by Old NGC, including Unknown Claimants. The remaining assets, principally the operating assets, went to the National Gypsum Company ("New NGC"), which technically speaking was a newly formed company but in fact was created pursuant to the Plan and carried on the business of the debtor under the same management.

The Bankruptcy and District Courts construed the Confirmation Order and the Plan of Reorganization to mean that New NGC was liable to Unknown Claimants whose claims could not be satisfied by the Trust (and who proved injury caused by exposure to the debtor's products) to the same extent that Old NGC would have been liable. The Court of Appeals reversed, holding that the Bankruptcy Court intended that New

NGC would be liable only to Unknown Claimants who could also clear the much higher hurdle of state successor liability law.

The Legal Representative and the BI-TAC, representing the interests of actual or yet unknown plaintiffs who have claims that arise from exposure to the debtor's products but that cannot be satisfied by the Trust, have an obviously strong interest in removing the hurdle placed in the way of those plaintiffs' ability to be fully compensated for their injuries.

The CCR's members and ACMC (a former CCR member) are and will be named as defendants in literally hundreds of thousands of lawsuits brought by Unknown Claimants. Now that the Trust has exhausted its ability to satisfy valid claims against ACMC at full value, if the decision below stands, many Unknown Claimants will be precluded from looking to New NGC to make up ACMC's shortfall. Under applicable principles of joint and several liability, the CCR's other members may have to make up that shortfall. Moreover, the CCR's members have potential contribution claims against ACMC and New NGC, making them potential Unknown Claimants as defined by the Plan. Thus they are affected by the judgment below, which largely defeats the right of Unknown Claimants to sue New NGC.

The attached brief supplements rather than duplicates the petition. It shows (among other things) that, at the time of the reorganization, New NGC fully understood that the Bankruptcy Court intended that the Confirmation Order and Plan of Reorganization by themselves would impose potential liability on New NGC, quite apart from state successor liability laws. Hence the Fifth Circuit's acceptance of New NGC's revisionist history flouts the parties' understanding of the Plan of Reorganization and, if not reversed, will deprive over 400,000 claimants of their right to recover for injuries caused by exposure to the debtor's products.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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BRIEF OF THE LEGAL REPRESENTATIVE FOR UNKNOWN ASBESTOS DISEASE CLAIMANTS, THE BODILY INJURY TRUST ADVISORY COMMITTEE, AND THE CENTER FOR CLAIMS RESOLUTION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTRODUCTION AND SUMMARY[1]

This case involves the construction of a Bankruptcy Court order confirming the 1993 Plan of Reorganization for the debtor National Gypsum Company ("Old NGC"). The Plan divided the debtor's assets between two entities. The operating assets went to the National Gypsum Company ("New NGC"),

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

which was created by the Plan to carry on the business of the debtor, and did so under the same management. The remaining assets, now essentially exhausted, went to the Asbestos Claims Management Corporation ("ACMC"), which is managed by the NGC Settlement Trust (collectively, "the Trust"), to be used to resolve claims brought by persons exposed to asbestos produced by Old NGC. That included so-called Unknown Claimants – persons who at confirmation had not yet been (but would be) exposed to Old NGC products, or who had already been exposed but, because of the long latency period of asbestos injuries, were unaware of their illness.

As the Trust ran out of money, and struggled to determine how to allocate its dwindling resources in the face of over 400,000 pending and predicted claims against it, it sought a ruling from the Bankruptcy Court whether, under the terms of the Confirmation Order and Plan of Reorganization, New NGC would be liable to Unknown Claimants whose claims the Trust could not satisfy (and who proved injury caused by exposure to the debtor's products).

At confirmation the Bankruptcy Court had ruled that it could not provide notice consistent with due process to Unknown Claimants, had no jurisdiction over them, and could not discharge their claims. Pet. App. 8a, 65a-67a. Reviewing these rulings, the Bankruptcy Court held that it had intended that New NGC would be liable to Unknown Claimants whose claims the Trust could not satisfy to the same extent that Old NGC would have been liable. *Id.* 60a-81a. The District Court affirmed that decision. *Id.* 40a-59a. The Court of Appeals reversed in a 2 to 1 vote, holding that the Bankruptcy Court intended that New NGC would be liable only to Unknown Claimants who could also clear the much higher hurdle of state successor law. *Id.* 3a-39a.

Amici represent the interests of pending and future Unknown Claimants and co-defendants of ACMC in pending and future

suits.[2] We concur with and support the petitioners' contentions that certiorari should be granted to review and correct the Court of Appeals' violations of the Due Process rights of the Unknown Claimants and the limitations of Bankruptcy Code § 1141. The result reached by the Fifth Circuit is fundamentally unfair to the more than 400,000 Unknown Claimants whose ability to recover from New NGC in the event of the Trust's insolvency was carefully left unimpaired by the Bankruptcy Court but has now been jeopardized and possibly eliminated altogether.

Rather than repeat the arguments of petitioners, we make two additional points below. First we show that, contrary to the Fifth Circuit's understanding of "the terms of the deal" struck at confirmation (Pet. App. 34a), all the participants, and in particular New NGC, recognized that the Plan of Reorganization made New NGC liable once the Trust's funds were exhausted. Second, we show that the Court of Appeals gave insufficient consideration to the views of the very court whose intent it was purporting to discern.

ARGUMENT

I. New NGC Acknowledged And Contested Its Liability For Unknown Claims At Confirmation.

Overwhelming contemporaneous evidence in the public record shows that New NGC, as well as the Bankruptcy Court, the petitioners, and the Legal Representative, fully understood at the time of confirmation that, under the Confirmation Order and Plan of Reorganization, the resources of the Trust were all that stood between New NGC and liability for Unknown Claims.

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[2] *Amici* are described more fully in their motion for leave to file this brief, *supra*.

The original draft of the proposed Plan would have forever barred Unknown Claimants from suing New NGC and thus completely relieved New NGC of liability. Pet. App. 6a. But the Bankruptcy Court held that it had no jurisdiction over those claimants because they did not hold "claims" as defined by the Bankruptcy Code. *Id.* 8a. Hence it imposed instead a "Channeling Order" requiring Unknown Claimants to look first to the Trust for compensation for their claims. *Id.* 9a. The Confirmation Order stated: "New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims *pending exhaustion of the remedy or remedies provided by the [Trust]*." *Id.* 10a, 15a.[3]

The statutory Committee of Bond and Trade Creditors (the "BT Committee") represented creditors with claims against Old NGC. Their claims were converted under the Plan primarily into stock in New NGC. Thus those creditors were the prospective owners of one hundred percent of New NGC before, and became the actual owners upon, the effective date of the Plan (July 1, 1993). As shareholders they were the equivalent of and had the power to bind New NGC itself, just as shareholders are equivalent to and can bind the corporation in a shareholder derivative action.[4]

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[3] The changes to the proposed Plan required by the Court's January 1993 ruling were effected by the Third Technical Modifications to the Plan. Pet. App. 9a.

[4] See, *e.g.*, Restatement (Second) of Judgments § 59(2) (1982) ("[T]he judgment in a derivative action by [a corporation's] stockholders or members is binding on the corporation."); 13 Timothy P. Bjur & James Solheim, Fletcher Cyclopedia of the Law of Private Corporations § 6043 (rev. vol. 1995) (both corporation and its shareholders are bound by a judgment in a derivative proceeding).

Those creditors, who may be presumed to have had the clearest eye to their own self-interest, understood perfectly that the Plan as confirmed imposed potential liability on New NGC. In fact they appealed the Confirmation Order to the District Court on that very ground – because "neither [it] nor the NGC Plan as confirmed discharges unknown asbestos claims or bars suits by [Unknown Claimants] against New NGC if the [Trust] can no longer pay such claimants in full."[5]

Similarly, they complained that the Bankruptcy Court had left New NGC "unprotected against the unknown claims" and that the Plan "subordinates the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos-related liabilities."[6] They described New NGC as "a newly created *successor* corporation" and objected that the Plan "adversely impacts bond and trade creditors by imposing the entire risk of a future shortfall in Asbestos Trust assets onto bond and trade creditors, whose equity interests in New NGC are necessarily subordinated and subject to any future asbestos-related judgments against New NGC."[7]

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[5] L. 6 at 7 (Brief of Appellant, [BT Committee], *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.* (N.D. Tex.), Apr. 21, 1993). Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court. This Court routinely takes notice of briefs filed in the lower courts, see, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 188 n.4 (2000); *United States* v. *Zolin*, 491 U.S. 554, 560 (1989); *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 81 & n.3 (1975), and so does the Fifth Circuit. See, *e.g.*, *MacMillan Bloedel Ltd.* v. *Flintkote Co.*, 760 F.2d 580, 587 (5th Cir. 1985). See also Weinstein's Federal Evidence § 201.12[3] (2d ed. 2001).

[6] L. 6 at 14, 15-16.

[7] L. 3 at 9, 24 (Omnibus Response of the [BT Committee] To First, Second and Third Motions of Appellees, National Gypsum Company and Aancor Holdings, Inc. to Dismiss Appeal, *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 19, 1993) (emphasis added).

Moreover, the BT Committee told the District Court that "the pecuniary interests of [its] constituency will be directly and adversely affected" by the Plan, which subjects New NGC "to an enormous, undetermined amount of future asbestos liability" and "unfairly shift[s] to [them] the entire risk that the Asbestos Trust assets will not suffice to pay asbestos claims in full."[8] That refrain appeared throughout the Committee's filings.[9]

And there is still more: opposing a motion to continue the Bankruptcy Court's modification of the automatic stay, the BT Committee noted that, under the Plan, "new NGC essentially has its assets backing up the assets of the asbestos settlement fund," and that "asbestos creditors have a right to come after new NGC under the confirmed plan if their pot declines in value."[10]

In sum, New NGC fully recognized that, if the assets of the Trust turned out to be insufficient, the Plan and the Confirmation Order made it liable to Unknown Claimants as a successor to Old NGC within the meaning of the Bankruptcy Code (*e.g.*, § 1145(a)(1)). That is as clear a matter of record as anything could be.

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[8] L. 4 at 10, 12 (Memorandum of Law in Support of Omnibus Response of the [BT Committee] To First, Second and Third Motions of Appellees, National Gypsum Company and Aancor Holdings, Inc. to Dismiss Appeal, *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 19, 1993). See also *id.* at 11 (Plan subjects New NGC "to an unanticipated and significant amount of future asbestos liability").

[9] See also L. 2 at 2 (Reply Brief of Appellant [BT Committee], *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 30, 1993) (the Plan subjected New NGC "to enormous future asbestos liabilities").

[10] See L. 5 at 35, 76 (Transcript of Proceedings, *In re National Gypsum*, No. 390-37213-SAF-11 (Bankr. N.D. Tex. Apr. 30, 1993)).

New NGC takes the position that it has no liability at all to Unknown Claimants under state successor liability law. Thus, it argued below that Texas successorship law governs all claims by Unknown Claimants, wherever brought, and bars them completely.[11] That gives the lie to its argument, which the Fifth Circuit astonishingly accepted, that it was merely stating mild concerns about "a more limited form of liability, state-law successor liability" (Pet. App. 24a), when it claimed in 1993 that the Order and Plan treated it as a "successor" (note 7, *supra*) with "its assets backing up the assets of the asbestos settlement fund" (note 10, *supra*), and subjected it "to enormous future asbestos liabilities." Note 9, *supra*.

In short, if New NGC had believed in 1993 that it was merely a successor subject to the almost impermeable protection afforded by Texas law, it would have had no reason whatsoever to object to the Confirmation Order and Plan.

Hence there is no escaping the fact that New NGC accurately perceived that the reorganization as confirmed in 1993 left it with "the entire risk that the Asbestos Trust assets will not suffice to pay asbestos claims in full." The Fifth Circuit accepted New NGC's revisionist history and overturned the rulings of the lower courts because it mistakenly believed an affirmance would "change the terms of the deal." Pet. App. 34a. In so doing the Fifth Circuit in fact vitiated the holding of the Bankruptcy Court that it had no jurisdiction to free New NGC from liability to Unknown Claimants.

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[11] L. 1 at 31-32 (Appellant's Brief, *National Gypsum Co.* v. *NGC Settlement Trust and The Asbestos Claims Management Corporation*, No. 3:98CV1032-P (N.D. Tex.), May 13, 1998).

II. The Court Of Appeals Wrongly Discounted The Views Of The Bankruptcy Court.

An appellate court should accord great deference to a lower court's interpretation of its own order, as the District Court correctly understood. See Pet. App. 51a.[12] Indeed, the Bankruptcy Court's intimate involvement with the complexities of developing and confirming the fairness of a reorganization plan is such that this deference extends not only to the Confirmation Order, but also to the Court's interpretation of the Plan of Reorganization itself.[13] Thus, a Bankruptcy Court's

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[12] See also, *e.g.*, *Farmhand, Inc.* v. *Anel Eng'g Indus.*, 693 F.2d 1140, 1146 (5th Cir. 1982) ("'We see no basis for substituting our judgment for that of the district court in interpreting his own order.'") (citation omitted); *United States* v. *Rhynes*, 206 F.3d 349, 369 (4th Cir. 1999) ("[D]istrict courts are best able to interpret their own orders" and "are entitled to 'inherent deference' when they construe the same.") (citation omitted); *In re Tomlin*, 105 F.3d 933, 941 (4th Cir. 1997) ("[T]he bankruptcy court's interpretation of its own order * * * warrants 'customary appellate deference.'") (quoting *Texas N.W. Ry.* v. *Atchison, Topeka & Santa Fe Ry.*, 860 F.2d 267, 272 (7th Cir. 1988)); *In re BoNo Dev., Inc.*, 8 F.3d 720, 721-22 (10th Cir. 1993) ("The bankruptcy court surely knows more about the meaning of its own order than we do, and its interpretation of its order * * * is entitled to substantial deference."); *Monarch Life Ins. Co.* v. *Ropes & Gray*, 65 F.3d 973, 983 (1st Cir. 1995) ("[T]he bankruptcy court in this case was interpreting its own order of confirmation. We think customary appellate deference is appropriate in these circumstances * * *."); *In re Ranch House of Orange-Brevard, Inc.*, 773 F.2d 1166, 1168 (11th Cir. 1985) ("[W]e are reluctant to disturb a bankruptcy court's judgment interpreting its own earlier order. The bankruptcy judge who has presided over a case from its inception is in the best position to clarify any apparent inconsistencies in the court's rulings.").

[13] See, *e.g.*, *In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994) ("In reviewing a bankruptcy court's interpretation of a confirmed plan, then, the reviewing court should extend to that interpretation the same deference that is otherwise paid to a court's interpretation of its own order."); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 961 F.2d 1260, 1264 (7th Cir. 1992) ("[W]hen a reorganization court interprets a confirmed plan of

interpretation must be upheld by a reviewing court so long as it is reasonable, and may be overturned only if it is an abuse of discretion.[14]

The Court of Appeals said that its "duty [was] to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown Claims." Pet. App. 16a. It also said that it "should defer to the bankruptcy court's reasonable resolution of any ambiguities in" the Plan of Reorganization and the Confirmation Order (*id.* 14a), and that in fact "there is ambiguity in the documents." *Id.* 19a. Yet the majority ruled that the Bankruptcy Court's interpretation of the Plan and its own Confirmation Order was unreasonable, and that "the bankruptcy court never intended" that New NGC would be liable as was Old NGC (*id.* 22a),[15] even though that interpretation was offered by the very court that presided over the Plan and wrote the Order, and was accepted by the District Court and the dissenting Court of Appeals judge.

The Court of Appeals' insistence on disregarding the Bankruptcy Court's intent is highlighted by its treatment of the Confirmation Order's ban on the recovery by Unknown

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reorganization, it interprets words on which it has already passed judgment. Under these circumstances, we believe that full deference to the court's decision is in order."); *Commission of Dep't of Pub. Utils.* v. *New York, N.H. & H. R.R.*, 178 F.2d 559, 563-64 (2d Cir. 1949) ("Any construction of a plan of reorganization by the district judge who is familiar with every phase of it is necessarily entitled to great weight.").

[14] See, *e.g.*, *Truskoski* v. *ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (a "court's interpretation of its order will not be disturbed 'absent a clear abuse of discretion'") (citation omitted); see also *In re Weber*, 25 F.3d at 417 (reasonableness standard); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d at 779-80 (abuse of discretion standard).

[15] See also Pet. App. 25a: "[T]he bankruptcy court wanted to impose [only] state-law successor liability on New NGC."

Claimants of punitive damages against New NGC. As the court noted (Pet. App. 25a-26a):

> [T]he Trust may be correct that the bankruptcy court's bar on punitive damages evinces an intent on the court's part to impose liability on New-NGC. That is, if the court intended to leave all questions of New-NGC's liability to state-law successor doctrine, it might seem odd that it would express any opinion on whether punitive damages could be recovered under state law.

The Court of Appeals went on, however, to rule "as a matter of law" that the Bankruptcy Court had no jurisdiction to bar punitive damages (*id.* 26a) and on that basis to "reject the argument that the punitive-damages bar has *any bearing* on New-NGC's liability for Unknown Claims." *Id.* 27a (emphasis added). The flaw in that reasoning is that, even if the Bankruptcy Court lacked jurisdiction to bar punitive damages, the fact that it did so is nonetheless highly relevant to its intent, and would have been taken into account by a reviewing court truly interested in discerning that intent (as it was by the District Court, see *id.* 54a).

This case is unusual in that three of the five judges to have considered the meaning of the Plan and Confirmation Order agree that it left New NGC with the same liability to Unknown Claimants as Old NGC. The majority would have reached the same conclusion had it fairly considered the objections of New NGC's owners at confirmation, and accorded the Bankruptcy Court's interpretation of its own rulings the deference it deserved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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16 pp

This is the third time that the Legal Representative for Unknown Asbestos Disease Claims (the "Legal Representative") and the Center for Claims Resolution (the "CCR") have sought to file *amicus curiae* briefs in support of the Petitioners in this appeal. The lower courts both denied identical *amicus* motions from these same parties[1] and this Court should deny their motion as well — particularly given the current procedural context of this case. Indeed, Supreme Court Rule 37.2(b) specifically provides that an opposed motion for leave to file an *amicus curiae* brief before the Court has considered whether to grant certiorari "is not favored." This provision is particularly apt here, where, as described below, the putative *amici* add nothing to the Petition.

1. As the Interests of the Proposed *Amici Curiae* are Purely Partisan, their Motion should be Denied, as it was in the Lower Courts.

The district court and the Fifth Circuit denied identical motions below on the grounds that proposed *amici curiae* were "clearly aligned" with petitioners and "purely partisan." App. A & B, attached hereto. Indeed, all three are directly and economically linked to the Petitioners. The CCR is a joint defense facility that, until June 2000, included Petitioners ACMC and the Trust among its paying members.[2] The Trust

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1. The Legal Representative and CCR have added the Bodily Injury Trust Advisory Committee (the "BI TAC") to their proposed *amici* team, but their arguments and attempts to raise matters outside of the record are the same. The orders of the district court and the Fifth Circuit denying their prior motions are set forth in full in the Appendix to this Opposition.

2. Capitalized terms not defined herein have the meaning assigned to those terms in Respondent's Brief in Opposition.

compensates the Legal Representative for acting as Legal Representative and pays the Legal Representative's lawyers and other professionals. Resp. App. 313a.[3] The Trust likewise pays fees to the BI TAC members for serving on the BI TAC and reimburses their expenses. Trust Agreement Section 6.07.

Since the start of this litigation, the Petitioners, the Legal Representative, and the BI TAC have collaborated in an attempt to have the asbestos liabilities of Old-NGC imposed on New-NGC. In the summer of 1997, before this litigation began, these parties exchanged drafts of motions and other court papers and then filed a series of pleadings attempting to have New-NGC held liable for the torts of ACMC. They coordinated their litigation strategies against New-NGC in the bankruptcy court. For example, when New-NGC sought the production of correspondence between the Legal Representative, the BI TAC and the Trust regarding this very litigation, they refused to produce such correspondence, claiming that they shared "common interests" with one another relating to New-NGC's liability for asbestos claims against Old-NGC and that such materials thus fell within the "joint defense privilege."

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3. The proposed *amici curiae* state that "no person other than *amici curiae* made any monetary contribution to the preparation or submission of their motion or brief." Motion n.1. Given the obligation of the Trust to pay the fees and expenses of the Legal Representative and the BI TAC, this representation may be correct only because reimbursement has not yet been made. The Trust has paid all of the attorneys' fees and expenses of the Legal Representative in connection with the litigation against New-NGC to date, including the fees and expenses incurred in the Legal Representative's motions for leave to file *amicus curiae* briefs in this appeal in the lower courts.

There is no doubt therefore that the interests of these parties are entirely partisan. They should not be permitted to participate in this appeal, particularly under the guise that they are "friends of the court."

2. The Proposed *Amici Curiae* Brief Raises No Issue that Warrants this Court's Attention.

We will comment briefly on the issues raised in the brief. The putative *amici* make two points. First, they start with the claim that New-NGC acknowledged its supposed liability for Unknown Claims at confirmation, because certain members of the BT Committee were concerned about the risk of that liability. In making that claim, they rely in the main on documents outside the record. Again, they tried to do this below, and the Trust even moved to supplement the record, but the lower courts rejected these efforts. No appeal was taken from the denial. More fundamentally, whether this supposed acknowledgment of liability indeed did occur (and the consequences of that) is purely a matter of sorting through the relevant documents and orders and is hardly an issue that merits this Court's attention. The Fifth Circuit was faced with precisely these claims below by the Trust and found those claims "insufficient to overcome the plain language of the Plan documents." Pet. App. 35a.

Second, *amici* argue that the Fifth Circuit failed to accord due deference to the bankruptcy court's interpretation of the Plan Documents. This argument has no relevance to the Petitioners' issues. Moreover, it does not on its own meet the standards for granting a petition set forth in Supreme Court Rule 10. The Fifth Circuit ruled that it should not defer to the bankruptcy court's conclusion that the Plan Documents "implicitly imposed" liability on New-NGC where such interpretation contradicted the unambiguous text of the Plan

Documents. Pet. App. 27a-28a. That ruling is not novel or controversial, nor does it present a conflict with the ruling of any other court. Instead, it is consistent with longstanding rules of construction that courts should give effect to the plain meanings of bankruptcy plans and orders and that a court, even one that confirmed the plan in question, cannot later change its terms under the guise of interpretation.

CONCLUSION

The motion for leave to file brief *amici curiae* in support of the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 20, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10758

In The Matter Of:

NATIONAL GYPSUM COMPANY;
AANCOR HOLDINGS INC

Debtors

THE NEW NATIONAL GYPSUM COMPANY

Appellant

v.

THE NATIONAL GYPSUM COMPANY
SETTLEMENT TRUST

Appellee

Case No. 99-10760

In The Matter Of:

NATIONAL GYPSUM COMPANY

Debtor

NATIONAL GYPSUM COMPANY

Appellant

v.

NGC SETTLEMENT TRUST; THE ASBESTOS
CLAIMS MANAGEMENT CORPORATION

Appellees

Appendix A

Appeals from the United States District Court for the Northern District of Texas, Dallas

ORDER:

IT IS ORDERED that the motion of Daniel Phillips to file amicus brief is DENIED

IT IS FURTHER ORDERED that the motion of Daniel Phillips to participate in oral argument is DENIED

IT IS FURTHER ORDERED that the motion of Center for Claims Resolution to file amicus brief is DENIED

IT IS FURTHER ORDERED that the motion to allow National Gypsum Company a reasonable period of time to file their reply brief, if the court permits either Daniel Phillips or Center for Claims Resolution to file an amicus curiae brief is DISMISSED AS MOOT.

/s/ Harold R. DeMoss
HAROLD R. DeMOSS
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION JULY 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO. 3:98-CV-1032-P

IN RE:

NATIONAL GYPSUM COMPANY
AANCOR HOLDINGS, INC.

Debtors.

NATIONAL GYPSUM COMPANY,

APPELLANT,

v.

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT, CORPORATION,

APPELLEES.

ORDER

Now before the Court are the following:

1. Conditional Motion of the Center for Claims Resolutions ("CCR") for leave to file *Amicus Curiae* Brief, filed June 9, 1998;

Appendix B

2. Appellant's Emergency Motion to Strike Brief of CCR and Opposition to Conditional Motion for Leave to file *Amicus Curiae* Brief and Supporting Brief, filed June 15, 1998;

3. Motion and Brief of Daniel M. Phillips, Court-Appointed Legal Representative for Unknown Asbestos Disease Claimants, for Leave to File *Amicus Curiae* Brief, filed June 15, 1998;

4. Appellees' Motion to Supplement the Record, filed June 15, 1998;

5. Appellant's Opposition to Motion of the Legal Representative for Leave to File *Amicus Curiae* Brief and Emergency Motion to Strike Brief, filed June 17, 1998;

6. Appellant's (A) Objection to Appellees' Motion to Supplement Record, (B) Motion to Strike References to Proposed Supplemental Record in Appellees' Brief and (C) Supporting Brief, filed June 18, 1998;

7. Legal Representative's Reply in Support of His Motion for Leave to File *Amicus* Brief, filed June 22, 1998;

8. Appellees' Reply Brief in Further Support of Motion to Supplement the Record, filed June 22, 1998; and

9. CCR's Opposition to Appellant's Motion to Strike its Brief and Its Reply in Support of Its Conditional Motion for Leave to File *Amicus Curiae* Brief, filed June 23, 1998.

Appendix B

A. Motion to Supplement the Record

In their motion, Appellees move to supplement the record in this appeal. Specifically, Appellees seek to include in the record five pleadings and briefs filed in either the main bankruptcy case below or in a previous appeal from the bankruptcy case. (Appellees' Motion to Supplement the Record, at 2).[1] Appellant objects to Appellees' motion to supplement the record, and moves to strike references to the proposed supplement in Appellees' brief. In their motion, Appellees maintain that the five documents are relevant to issues raised in Appellant's brief in the captioned appeal to this Court. In seeking to strike these items, Appellant asserts that none of the proposed supplemental documents were part of the trial record before the Bankruptcy Court. Further, Appellant argues that the Bankruptcy Court sustained an objection preventing Appellee from introducing one of the documents into evidence at trial. (NNG's Objection to Appellees' Motion to Supplement the Record, at 2).

An item that was not considered by the trial court in reaching its decision should be stricken from the record on appeal. *Metro North State Bank v. Barrick Group, Inc.*, 100 B.R. 152, 154 (Bankr. D. Conn. 1989); *Daly-Murphy v. Winston*, 820 F.2d 1470, 1473 (9th Cir. 1987). Despite the alleged relevance of the documents, there is no indication that the Bankruptcy Court considered or even reviewed the proposed documents when reaching its judgment in the underlying adversary proceeding. An appellate court is to

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1. A description of the five documents appears at page 2 of Appellees' Motion to Supplement the Record.

review what happened in the court below; an appeal does not present a party with "a license to build a new record." *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981). Absent any indication that the Bankruptcy Court considered any of the proposed documents in arriving at its ruling, the Court declines to allow the proposed documents to become part of the record of this appeal. Consequently, Appellees' Motion to Supplement the Record is, hereby, DENIED. Accordingly, all references to the proposed supplement in Appellees' brief shall be stricken.

B. CCR's Standing

In its motion, the CCR asserts that they believe they are a proper party to this appeal, and, therefore, they seek to file a brief in support of the Bankruptcy Court's judgment. (Conditional Motion of CCR for Leave to File *Amicus Curiae* Brief, at 1). If the Court determines that CCR is not a proper party to this appeal, then CCR seeks leave to file their brief as an *amicus curiae*. *Id.* For the foregoing reasons, however, the Court concludes that CCR is not a proper party to this appeal, and denies CCR leave to file its brief as an *amicus curiae*.

It is undisputed that CCR was neither a party to the underlying adversary proceeding, nor sought leave to intervene in that action.[2] Despite their failure to intervene in the adversary proceeding, the CCR asserts that it is a proper party and has standing to appeal the Bankruptcy Court's judgment. (Conditional Motion of CCR for Leave to File

2. In addition, the CCR offers no explanation for their failure to seek to intervene in the underlying adversary proceeding.

Amicus Curiae Brief, at 1). To possess standing to appeal a bankruptcy court's order, a litigant who was not a party to the adversary proceeding must qualify as a "person aggrieved" by that order. *Bayoud v. Medical Center Hospital of Garland*, 188 B.R. 925, 931 (N.D. Tex. 1995) (citations omitted). In general, only persons "directly and adversely affected pecuniarily by an order of the bankruptcy court have been held to have standing to appeal that order." *In re Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992) (*quoting In re Fondiller*, 707 F. 2d 441, 442 (9th Cir. 1983). In their motion, the CCR asserts that it satisfies the "person aggrieved" requirement, and therefore has standing, "because a reversal of the Bankruptcy Court's judgment would have an adverse pecuniary impact on the CCR's members." (Conditional Motion of CCR for Leave to File *Amicus Curiae* Brief, at 1). The Court does not agree.

The CCR does not satisfy the "person aggrieved" standard with respect to this appeal, because it has not shown that it was directly and adversely affected pecuniarily by the Bankruptcy Court's Order. Specifically, the CCR does not seek to appeal an *adverse* ruling from the Bankruptcy Court. Rather, the CCR wishes to file a brief, and participate as a party in this appeal, in order to *support* the Bankruptcy Court's judgment. While the CCR acknowledges that it was not adversely affected by the Bankruptcy Court's judgment, it argues that "[p]arity of reasoning should accord the same party status to a person with pecuniary interests at stake who seeks to participate in the appeal to uphold rather than challenge a judgment." (Brief of CCR, at 5). Despite this belief, the CCR fails to cite any case law or other authority to support this proposition. Moreover, the Court recognizes

and agrees with the established policy of limited appellate jurisdiction in the bankruptcy context. *See Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989) (explaining that decisions adopting the "person aggrieved" standard " 'reflect the understandable concern that if appellate jurisdiction is not limited, bankruptcy litigation will become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order' ") (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988)). Given that the Bankruptcy Court's judgment does not directly and adversely affect pecuniarily the CCR, the Court concludes that the CCR has not satisfied its burden of showing that it has standing under the "aggrieved person" standard. Accordingly, the Court finds that the CCR is not a proper party to this appeal.

C. Motions for Leave to File *Amicus* Briefs

Both Daniel M. Phillips ("Phillips"), the legal representative appointed to represent unknown disease claimants, and the CCR seek to file briefs as *amicus curiae.* Whether to accept, *vel non*, an *amicus* brief is solely within the discretion of the court. *Linker v. Custom-Built Machinery Inc.*, 594 F. Supp. 895, 897 (E.D. Penn. 1984) (citing *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974)). Upon a cursory examination of the submissions, it is obvious that both Phillips' and the CCR's interests are clearly aligned with that of Appellees' with respect to the main issue on this appeal. Consequently, neither Phillips nor the CCR can be considered a disinterested "friend of the court". *See Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982).

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While a party need not be "totally disinterested" to be an *amicus curiae*, leave to file should be denied if the *amicus* brief comes from a person with a partisan, rather than impartial view. *See Id.* As this Court has previously noted, "[t]he amicus curiae tradition does not sanction allowance of additional oral and written argument that is purely partisan." *Browning v. Prostok*, Civ. Action No. 3:96-CV-1206-P (N.D. Tex. Aug. 19, 1998 (Solis, J.) (attached as Ex. A to Appellant's Emergency Motion to Strike Brief of Center for Claims Resolution and Opposition to Conditional Motion for Leave to File *Amicus Curiae* Brief and Supporting Brief).

Accordingly, for the reasons stated, the Court finds that Phillips' and the CCR's motions for leave to file *amicus curiae* briefs should be and are, hereby, DENIED.

Appendix B

CONCLUSION

Having carefully considered the parties' arguments and the pertinent authorities, the Court concludes that:

1. Appellees' Motion to Supplement the Record should be DENIED;

2. The CCR's is not a proper party to this action, its Conditional Motion for Leave to File *Amicus Curiae* Brief should be DENIED.

3. Phillips motion for leave to file *amicus curiae* brief should be DENIED.

So Ordered.

This *13th* day of July, 1998.

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge